

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE WESTERN DISTRICT OF VIRGINIA**
3 **Roanoke Division**

4 **COREY E. JOHNSON,**

5 **Plaintiff,**

6 **v.**

7 **CASE NO.**
7:20cv582

8 **(K-9) OFFICER MCCOWAN, et al.,**

9 **Defendants.**

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14 **VIDEOCONFERENCED**

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16 **DEPOSITION UPON ORAL EXAMINATION**

17

18 **OF PATRICK H. HURLEY**

19

20 **TAKEN ON BEHALF OF THE DEFENDANTS**

21

22 **Richmond, Virginia**

23

24 **September 13, 2022**

25

26 **KATHLEEN BEARD ADAMS, CCR, RPR, CRR**

27 **Court Reporter**

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11	2	Expert report (rebuttal)
12	3	Police One - Factors that influence the use of force in a correctional institution
13	4	VDOC Use of Force Procedures (OP 420.1)
14	5	VDOC Canine Operating Procedure (OP 435.3)
15	6	Human Rights Watch - Cruel and Degrading, The Use of Dogs for Cell Extractions in U. S. Prisons
16	7	McCowan deposition transcript
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11 duly sworn, was examined and testified as follows:

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EXAMINATION

13

BY MR. DAVIS:

14

14 Q. Good morning, Mr. Hurley. My name is
15 Timothy Davis. I'm an attorney for the defendants
16 in this case.

17

17 Could you please state your name for the
18 record?

19

A. Yes, sir. Pat Hurley, H-U-R-L-E-Y.

20

Q. And, Mr. Hurley, are you an expert witness retained by the plaintiff in this lawsuit?

22

A Team

23

23 Q. And could you describe for me what you
24 consider to be the scope of your expertise that you
25 are offering here?

1 A. I laid that out in the beginning of the
2 reports, to look at the policies, procedures,
3 practices, and to see if the force used upon
4 Mr. Johnson was necessary, appropriate, or
5 excessive. I'm paraphrasing.

6 Q. Understood. You authored the initial
7 expert report and rebuttal to the defendants' expert
8 report in this case, correct?

9 A. Correct.

10 Q. All right. I'm going to pull those up
11 right now.

12 And so, Mr. Hurley, for use of the
13 documents today I'll be using the screen share here
14 in the Zoom. If there is ever a point where you
15 need me to go to a particular part of the document
16 or zoom in on something, anything like that, just
17 let me know and we'll work with that.

18 Can you see the document that's being
19 screen shared right now?

20 A. I can.

21 Q. Is this your initial expert report?

22 A. I believe it is. Yes.

23 MR. DAVIS: All right. I'd like to make
24 this Defendants' Exhibit 1?

25

1 (Defendants' Exhibit 1 was marked for
2 identification.)

3 BY MR. DAVIS:

4 O. Can you see this document here?

5 | **A.** **Yes.**

6 Q. Is this your rebuttal report?

8 MR. DAVIS: All right. I'd like to make
9 this Defendants' Number 2.

10 (Defendants' Exhibit 2 was marked for
11 identification.)

12 BY MR. DAVIS:

13 Q. Mr. Hurley, do you have copies of these
14 reports aside from the screen share available for
15 your access here?

16 A. I do.

17 Q. Okay. So it may be a little easier when
18 we're talking about the report itself, since we'll
19 be talking about those a lot, to not just have that
20 constantly up on screen share. So I'm going to take
21 those down. There will be some other documents I'll
22 be putting up here today.

23 A. Understood.

Q. Given your expert experience,

25 Mr. Hurley, I would guess you've been deposed

1 before.

2 A. Yes.

3 Q. Okay. So I'll skip the preliminaries
4 here.

5 Just a couple of questions for you. Did
6 you speak to anyone to prepare for today's
7 deposition.

8 A. Yes, I did.

9 Q. Who did you speak with?

10 A. Mr. Johnson --

11 Q. How --

12 A. -- Andrew Johnson.

13 Q. Pardon me.

14 How long did you speak with Mr. Johnson?

15 A. Maybe 45 minutes.

16 Q. Did you review any materials to prepare
17 for today other than those that you've listed in
18 your reports?

19 A. No.

20 Q. Is there any reason you feel you'd be
21 unable to testify today?

22 A. No.

23 Q. So I'd like to ask a couple of questions
24 about your background.

25 You have experience working in

1 corrections, correct?

2 A. Yes.

3 Q. Could you describe your corrections
4 career for me?

5 A. It started in 1980 at the Chillicothe
6 Correctional Institute, Chillicothe, Ohio, where I
7 was a substance abuse counselor. Then I transferred
8 to the Department of Developmental Disabilities for
9 a two-and-a-half-year stint working at a facility
10 for those folks who had disabilities. Went back to
11 Chillicothe as a case manager/ classification
12 specialist, worked in various positions. Moved over
13 to Ross Correctional Institution, a new institution
14 which was opening, and went and worked at a field
15 facility for -- I can't remember how -- about six or
16 seven years. Worked at five different facilities.
17 Did headquarters twice. Was a deputy warden for ten
18 and a half years, a warden for about five and a half
19 years, was their special forces commander for about
20 a year and a half. Without looking at my CV, these
21 are rough estimates. And then finished my career in
22 the headquarters as the bureau chief for
23 construction and maintenance, which was responsible
24 for all the large capital projects for the agency.
25 And that was my experience or tenure with the Ohio

1 Department of Corrections.

2 Then I worked for the Ohio Department of
3 Youth Services as a consultant for about six and a
4 half years to help them get into compliance with --
5 or the conditions of complying with a consent
6 judgment. Specifically I was responsible for
7 helping them getting into compliance with the
8 use-of-force stipulation of that consent judgment.

9 Q. And is that the Stickrath case you're
10 referring to there?

11 A. Yes. Yes.

12 Q. Okay. So I'll come back to that because
13 I'm going to have a few questions about that case.

14 When did you last work for the Ohio
15 Department of Corrections?

16 A. Excuse me. I believe it was 2009, but
17 again I'd have to refer to my CV.

18 (Reporter clarification).

19 A. It should be on my CV. I have it as
20 2008. Sorry.

21 BY MR. DAVIS:

22 Q. Was there any point in your corrections
23 career when you worked as a security officer?

24 A. There was not.

25 Q. And so there would not have been any

1 occasion where you would have used force on an
2 inmate?

3 A. That's not correct.

4 Q. When would you have done that?

5 A. Throughout my career in literally almost
6 every position I held I used force. The exception
7 would be when I was bureau chief for construction,
8 activation and maintenance. Maybe when I was the
9 commander of the special forces, or STAR team they
10 called it. I even used force when I was a
11 consultant to the Ohio Department of Youth Services.

12 So the unique thing about Ohio
13 corrections was everyone was trained to use force.
14 Everyone was expected to respond, even the
15 secretaries. When I first started my career
16 secretaries were weapons-trained and they would
17 stand on the perimeter outside the prison during fog
18 conditions to prevent a potential escape. So the
19 approach and the philosophy was different and we
20 were all expected to know how to do that and we were
21 expected to respond.

22 Q. Okay. So in addition to having to use
23 force yourself did you ever oversee or investigate
24 uses of force by other officers?

25 A. Yes.

1 Q. Would you describe that role for me?

2 A. Okay. That started at the beginning of
3 my career in 1980 even as a substance abuse
4 counselor. The institution had use-of-force review
5 committees, a three-member panel, and they had a
6 mixture of disciplines sit on that panel. And there
7 would be the inmates, there would be the officers,
8 and we'd look at the reports, and as a committee we
9 would make determinations with independent votes
10 about whether we felt the force was necessary,
11 appropriate, or within the guidelines.

12 I did that throughout my career. When I
13 became deputy warden I was responsible for reviewing
14 all use-of-force cases. Again there was a committee
15 evaluation that came to me where I looked at all the
16 incident reports, the videos, those kinds of things.
17 Then as warden again was responsible for reviewing
18 those things, accepting the recommendations or
19 referring it back for further investigation or
20 referring it to a different committee for
21 investigation, any of those types of things.

22 And then in my role with the Ohio
23 Department of Youth Services as a consultant I was
24 responsible for designing their use-of-force review
25 process and then conducting the quality assurance

1 portion of that for all the facilities. So again I
2 was looking at the videos of the cases, the incident
3 reports, and the work of those folks who were
4 assigned the first level of use of force review.

5 Q. Thank you. During your time on the
6 use-of-force review committee and other instances
7 where you were reviewing use of force did you ever
8 review instances of the use of canine force?

9 A. No, because we didn't use canines except
10 for institutional search purposes. And in my role
11 with the Nunez monitoring team I reviewed their
12 policies and had input on that and those kind of
13 things, which I put references in my report
14 regarding the Nunez stance about canine -- canine
15 policy.

16 Q. And I'll also have some additional
17 questions about the Nunez case.

18 A. Sure.

19 Q. Did you have experience training
20 officers in the use of force?

21 A. Yes.

22 Q. And in what role?

23 A. Certainly in my role as the inspector,
24 or I think it's listed as the inspector of
25 institutional services. That was with Chillicothe

1 Correctional. And spoke at the in-services about
2 inmate grievance procedures and how I would handle
3 use-of-force incidents. And then in my role as
4 deputy warden certainly I spoke at all the employee
5 in-services and again explained what was appropriate
6 force, what would be excessive force, those kinds of
7 things. As warden did the same thing, spoke at all
8 the in-services and sometimes used some of the cases
9 we had had to demonstrate what was reasonable and
10 acceptable force, even high-level force, and when
11 force was unnecessary or excessive. Then again in
12 my role with the Ohio Department of Youth Services
13 taught classes at almost every pre-service class and
14 then taught all the supervisors about planned
15 interventions and appropriate force. So, yeah,
16 that's the experience I can recall at the moment.

17 Q. Other than your work as a consultant or
18 an expert witness, have you ever been involved in
19 litigation against either the Department of
20 Corrections or correctional staff?

21 A. I'm not sure I understand your question
22 clearly.

23 Q. Have you ever been in a lawsuit against
24 correctional staff or your Department of Corrections
25 aside from your work as an expert?

1 A. Well, as a deputy warden I was the
2 subject of many lawsuits when I was working in my
3 career, if that's the question you're asking.

4 Q. No. And I'm certainly familiar with the
5 volume of lawsuits that can come with the job, but
6 have you ever been adverse to your department or
7 other correctional staff in a lawsuit?

8 A. Do you mean serving for plaintiff's
9 counsel or serving for a defendant --

10 (Reporter clarification)

11 A. I'm saying that I'm not sure that I
12 clearly understand what he's asking me. Is he
13 asking me have I served as a subject-matter expert
14 for plaintiff's counsel always or have I ever served
15 as an expert for defendants' counsel?

16 BY MR. DAVIS:

17 Q. Well, let me ask that question then.
18 Have you ever served as a subject-matter expert for
19 defendants in a correctional lawsuit?

21 O. And do you recall what cases those were?

22 A. I'd have to look at the CV. I know one
23 was the Maryland Department of Corrections. I was
24 retained by the Maryland Attorney General's Office.
25 I was consulted by the South Carolina Department of

1 Corrections. Unfortunately, that was not directly a
2 use-of-force case. It was a protection-from-harm
3 case.

4 Q. Was the Maryland Department of
5 Corrections case -- was that a use-of-force case?

6 A. Yes. Oh, I'm sorry. It was protection
7 from harm.

8 Q. Have you ever testified as a defense
9 expert in any use-of-force case?

10 A. At the moment I can't recall that. I
11 can't recall that specific issue.

12 Q. Are all of the cases listed in your --
13 in your report civil rights cases brought by a civil
14 action?

15 A. I believe so. And, again, I'm not an
16 attorney, so if I misrepresent anything it may be
17 that I may not understand that it was or was not a
18 civil case, but it's my understanding that the
19 majority of them were.

20 Q. You don't recall any criminal cases
21 you've testified as an expert in?

22 A. No.

23 Q. Are those primarily use-of-force cases
24 or a range of different kind of claims brought in
25 those?

1 A. They're a range.

2 Q. Okay. Aside from use-of-force cases
3 what else have you testified to?

4 A. Protection from harm. They were, I
5 guess, conditions-of-confinement issues, such as
6 access to medical care, in-custody death related to
7 overdose issues, civil rights violations in terms of
8 racial disparity or equal access to certain
9 classifications or programs or disabilities. It
10 could be a mixture of those things.

11 Q. Did the use-of-force of cases you've
12 testified in have any incidents involving the use of
13 a canine?

14 A. They have not.

15 Q. Are there any cases that you have
16 testified in since you submitted your initial
17 report?

18 A. Yeah. Well, a very short deposition is
19 what I want to say. And it was related to
20 Mr. Lemuel.

21 Q. Mr. Lemuel is the plaintiff?

22 A. Yes. I'm trying to find that right now.

23 I apologize. That would be probably on
24 page 6 of the CV. It looks like the date is October
25 2021. And for some reason my printer put gray marks

1 across the right side of my page so I can't see the
2 whole page, but it looks like Case Number
3 1:20-cv-01875.

4 Q. All right. I see that one there. So
5 you recently have given deposition testimony in that
6 case?

7 A. It was very brief, but yes. We had
8 internet issues, so after about ten minutes they
9 decided they would reschedule, and then I believe
10 they talked settlement.

11 Q. Well, let's hope we don't have that come
12 up today.

13 I'd like to ask about a couple of the
14 consulting matters that you've been involved in.

15 Let's first talk about the Stickrath
16 case. So what do you recall were the facts of this
17 case?

18 A. As I said, it was conditions of
19 confinement, so issues related to access to medical
20 care, access to mental health care, appropriate
21 levels of educational opportunities and programming,
22 but primarily excessive force.

23 Q. Was this a class action?

24 A. It was. This was a case that was
25 brought before the courts before I became involved,

1 so it was already settled by the time they asked me
2 to come help. I believe the Department of Justice
3 was involved in that along with the plaintiffs'
4 counsel. And, yes, it was a class-action
5 settlement.

6 Q. Okay. And so that was a consent decree
7 with Department of Justice involvement?

8 A. That's my understanding, yes.

9 Q. And was this involving -- was this
10 involving adult corrections or juvenile?

11 A. It was juvenile.

12 Q. And did this involve a single facility
13 or the whole department?

14 A. The entire department.

15 Q. What was your role as consultant?

16 A. It was to evaluate their use-of-force
17 processes and then to develop a review process and
18 training programs to help them to come in compliance
19 with the use-of-force portion of that stipulation,
20 which they did achieve several years in advance of
21 the closure of the settlement agreement. It was one
22 of the first components to be released I guess would
23 be the legal term. And the use-of-force issue was
24 never brought back before the courts.

25 Q. And so you said there were -- there were

1 use-of-force stipulations in the consent decree?

2 A. It was -- that may not be the legal
3 technical term for that, but certainly a major
4 component of that consent judgment was related to
5 use of force.

6 Q. Was there a monitor or some other third
7 party appointed to oversee the settlement?

8 A. There was.

9 Q. And so in your consultant role were you
10 retained by the monitor?

11 A. No. I was retained by the agency.

12 And I want to clarify something. I
13 didn't have a traditional contract in the
14 traditional sense. They had me as, I guess, a
15 part-time employee, but it was with the
16 understanding that I was a consultant.

17 Q. Understood. Was there anything in this
18 case involving use of canines?

19 A. There was not.

20 Q. Okay. Now I want to ask you about the
21 Nunez case. Actually, before I move on to Nunez,
22 has the Stickrath case -- has that been closed or is
23 that still ongoing?

24 A. It was closed. I don't know the exact
25 year.

1 Q. Okay. Now I'll ask about the Nunez
2 case. So what is your understanding of the facts in
3 that case?

4 A. And, again, there's a lot of components
5 to the settlement agreement, but it was a conditions
6 of confinement, similar to the one in Ohio; access
7 to medical care, access to mental health care,
8 physical conditions of the facility, and excessive
9 force.

10 Q. Was this also a class action?

11 A. Yes. And again it involved
12 participation by the Department of Justice. They
13 joined the plaintiffs' counsel together.

14 Q. And did that also end up as a consent
15 decree?

16 A. Yes.

17 Q. And do you recall whether the scope of
18 that case -- well, actually, let me back up.

19 Were the plaintiffs in this case -- were
20 they convicted prisoners or were they pretrial
21 detainees?

22 A. It was everybody, so you had a mixture.
23 They had pretrial detainees, they had some from my
24 understanding who were awaiting transfer to the
25 state correctional system, then you also had ICE

1 detainees. So it was a mixture of detention folks.

2 Q. Was -- did this only relate to a single
3 facility?

4 A. No. New York Department of Corrections
5 has nine facilities, and one of those is even a
6 barge that's on the river. So when people refer to
7 Rikers Island they may think of one jail, but
8 actually there's several jails on Rikers Island.

9 Q. Okay. So this was -- was this -- did it
10 cover the entire New York Department of Corrections
11 or just the Rikers Island complex?

12 A. It's my understanding that it was the
13 entire department.

14 Q. So what was -- what was your role in
15 Nunez?

16 A. My role was to review all training
17 materials related to the consent judgment, to make
18 recommendations to the monitor on whether to accept
19 those training materials or require modifications to
20 those training materials, to observe the actual
21 training of those subjects. And then to monitor a
22 large volume of use-of-force cases has been a
23 mixture; men, women, adults, young adults,
24 adolescents. I was targeted with focusing on the
25 adolescents wherever they went and have continued to

1 do that. But, again, I've reviewed use-of-force
2 cases for every jail in the New York Department of
3 Corrections.

4 Q. What was your recommendation regarding
5 the training materials?

6 A. Well, if I felt that the sequence of the
7 material was out of order, where students wouldn't
8 necessarily learn the building blocks of the
9 training program, where perhaps deescalation was out
10 of sequence, not emphasized properly, whether some
11 techniques from a defensive tactics or a restraint
12 standpoint were prone to cause injuries or prone to
13 have positional-asphyxiant issues, I would make
14 recommendations regarding that.

15 And it covered a lot of topics in the
16 use-of-force arena; chemical agents, taser,
17 defensive tactics, cell extraction, something they
18 called a probe team, and use-of-force policy
19 instruction, all the refresher lesson plans, the
20 crisis intervention.

21 And I'm just trying to focus on things
22 that would be purely related to use of force. I'm
23 probably forgetting something, but I've made
24 multiple reviews of all those training curriculums
25 and observed those training curriculums, sometimes,

1 more than once, participated in some of those,
2 including their defensive tactics, and had them
3 dismiss OC spray only to have that reversed.

4 Q. Did any of that involve use of canines?

5 A. They do have canines, as I said in my
6 report, so I was tasked with reviewing the canine
7 policy and making recommendations. I was also
8 tasked with meeting with the commissioner, their
9 legal counsel, their emergency services unit, which
10 has the canine unit, to address concerns and make
11 recommendations regarding changing some of their
12 procedures. And then throughout that time I've
13 looked at their policy with the team and it would be
14 team recommendations.

15 Q. Were your recommendations accepted by
16 the monitor?

17 A. Yes.

18 Q. Do you know if your recommendations are
19 included in any of the monitor's reports that they
20 filed with the court?

21 A. They most likely would be. They're not
22 identified as mine. And it wouldn't be just
23 isolated to issues regarding canines. My
24 recommendations or narratives may be in many of
25 those reports, but they're never identified as an

1 individual monitoring team member.

2 Q. Okay. Do you know if the
3 recommendations that you made -- are those still in
4 effect with that agency?

5 A. Yes, as far as I know. We're -- that's
6 still an active consent decree and we're still
7 actively involved in the monitoring process, so
8 every month I have things to review related to
9 Nunez.

10 Q. You also mentioned in your
11 qualifications consulting with the Department of
12 Homeland Security. Could you describe what you did
13 there?

14 A. Okay. And that's one I'm still
15 involved. So they conduct either virtual or on-site
16 inspections or investigations of ICE detention
17 facilities and/or border patrol stations, and I've
18 done both. And we look at all kinds of conditions
19 of confinement. It's similar to an American
20 Correctional Association audit, so we may be looking
21 at things such as the arsenal inventories, to PREA,
22 to use of force, to the grievance procedure, quality
23 of food, clothing. There's a large gamut of things.

24 Q. And is this connected with any active
25 litigation?

1 A. No.

2 Q. Is there any other consulting work --
3 aside from the expert testimony you've listed and
4 the work with DHS and the Nunez and Stickrath cases,
5 any other consulting you've done about use of force
6 or use of canines?

7 A. I would say I have with disability
8 rights of Pennsylvania, and that involved
9 pre-litigation issues regarding the Department of
10 Youth Services in Pennsylvania. I did look at a
11 number of use-of-force cases for them, drafted
12 recommended use-of-force policies and/or
13 use-of-force review processes.

14 There's a small private facility in
15 Ohio, I helped defend them, but also in that process
16 spoke with the facility director about things that I
17 thought they should change, improve, or things they
18 were doing very well in their use-of-force review
19 process.

20 Q. You said that was a juvenile department?

21 A. Yes.

22 Q. Any other consulting?

23 A. No.

24 Q. All right. In that case I'd like to
25 move on to the report itself. And before we get to

1 anything with the substance of it I want to ask if
2 you can clarify for me where your opinions are that
3 you offer in this report. I see there's a list of
4 opinions beginning on page 53 and continuing to the
5 end of the report. Is anything else in the body of
6 the report offered as an opinion by you?

7 A. Well, I believe that it would. I make
8 comments throughout all those sections for issues
9 which I think are the foundations of my opinions.
10 Particularly the rebuttal report where I disagree
11 with the defense expert, I explain why I disagree
12 and then provide the rationale for that
13 disagreement.

14 So they may not be officially labeled as
15 an opinion, but I think if I'm saying I disagree and
16 why I disagree that loosely that would be considered
17 an opinion, but I've summarized those and provide
18 the conclusions at the end of the reports.

19 Q. Okay. So that portion at the end is
20 your list of opinions. And that -- the body of the
21 opinion preceding that, that's your analysis and
22 citations in support of those?

23 A. Yes.

24 Q. Okay. So when we get to the end of the
25 initial report I think we'll want to look back and

1 just so I can better understand which parts of the
2 report correspond to which of your opinions. We'll
3 get to that later.

4 So I'd like to start with -- the heading
5 is IV, Expectations Regarding Use Of Force. It's
6 beginning on page 4 of your report.

7 On the next page you cite to two Supreme
8 Court cases, Kingsley versus Hendrickson and Graham
9 versus Connor. Do you see where those citations
10 are?

11 A. Are we on page 5 now?

12 Q. Yes, sir.

13 A. Yes.

14 Q. And you refer to those cases as
15 providing an objective reasonableness framework for
16 use-of-force incidents, correct?

17 A. Correct.

18 Q. Is that the framework you used to
19 evaluate the use of force here in this case?

20 A. Yes, in part.

21 Q. Would you elaborate?

22 A. I think I made a reference to a
23 different case later with that. It spoke about the
24 need for force, the proportionality, whether the
25 force was tempered, and relationship to injuries.

1 Q. Is that the Whitley case you cite on
2 page 8?

3 A. Yes.

4 Q. And so are you using both of those
5 standards in conjunction here?

6 A. I did. And, again, I'm not a lawyer, so
7 I'm going to answer that question this way:
8 Historically there's been, shall we say, a gray area
9 related to which case law applies to convicted
10 people versus pretrial detainees, but I think I
11 explain in my report that the Graham versus Connor
12 has historically been discussed in corrections as
13 one of the foundations for assessing use of force.
14 So, given that it's mentioned by the Virginia
15 Department of Corrections, I included it in the
16 discussion.

17 Q. Okay. So also considered the Whitley
18 case?

19 A. Yes.

20 Q. Okay. So beginning on page 6 you take
21 an excerpt from an article. It's from a website
22 PoliceOne.com. The name of the article is Factors
23 that influence the use of force in a correctional
24 institution. And that continues on to page 8 of the
25 report. Do you see that?

1 A. Yes.

2 Q. So I'm going to screen share that
3 article. Can you see this, Mr. Hurley?

5 MR. DAVIS: All right. And we're
6 actually here on page 2 of the article. Madam Court
7 Reporter, I'd like to make this Defendants' Number
8 3.

9 (Defendants' Exhibit 3 was marked for
10 identification.)

11 BY MR. DAVIS:

12 Q. There are a few -- there are factors you
13 list here in this excerpt. There are a few others
14 that are included in the article but omitted from
15 your excerpt. Was there any particular reason for
16 leaving those factors out?

17 A. There was not. And if so, it may be
18 related to a download where it maybe didn't capture
19 everything. So if you display those, I'll address
20 that, but -- or if I did not, then I probably have a
21 reason why I did not. I don't recall. I know I've
22 used this in other reports, so I don't know as we
23 sit here right at the moment.

24 Q. And that's okay. I just wanted to see
25 if there was a particular reason.

1 There are a couple of the factors that
2 you listed here that I wanted to talk about, the
3 first being the factor -- the first factor you list
4 here, "The need for physical force is reduced in the
5 controlled environment that exists in an
6 institution."

7 Could you explain how you think that
8 factor is implicated by the use of force in this
9 case?

10 A. Sure. This incident was isolated to one
11 housing unit. So there's no indication or
12 information that it was getting out of control or
13 involved any other area but the area right where
14 Mr. Johnson and Mr. Guy were engaged in a fight,
15 just those two.

16 Responders were on the way. It appeared
17 that Officer Mullins was using his radio before I
18 was actually able to see the fight on the floor.
19 From indications in the report those radio calls did
20 go out, the responders were on the way.

21 And the article is correct.

22 Correctional facilities by design have the ability
23 to isolate incidents quickly. I haven't had the
24 opportunity to see the facility, but looking at what
25 was available through that video it was contained to

1 that area.

2 Q. So the next factor, "Rapid multiple
3 officer response minimizes the need for use of force
4 options."

5 From your review do you recall how many
6 officers were present during the altercation and the
7 subsequent use of force.

8 A. Well, there was Officer Mullins, K-9
9 Handler Baker, K-9 Handler McCowan, I believe a
10 sergeant responded and/or maybe one other officer,
11 but those were sufficient numbers for the situation
12 because, again, the fighters were separated, all the
13 other inmates were on the ground or sitting and away
14 from the incident. So it was -- it was a controlled
15 situation.

16 Q. The next factor listed here,
17 "Surveillance technology aids in early detection and
18 suppression of situations that require use of
19 force."

20 Did you feel that the surveillance
21 cameras had any effect as far as the way or the
22 manner that the officers responded here.

23 A. I'm not sure I understand your question
24 fully.

25 Q. Well, that factor is listed as

1 suggesting that having cameras/surveillance
2 available in a correctional setting certainly allows
3 an early intervention by staff. Do you feel that
4 that had any effect on the outcome of this incident?

5 A. I don't know for certain, but what it
6 appears was that the response was fairly rapid and
7 sufficient. There's no documentation to indicate
8 who may have been viewing the video live, but
9 traditionally when a call for help goes out, the
10 control-room officer, or in a similar situation the
11 folks that have access to those cameras, focus on
12 that location and/or move cameras so they can see
13 what's going on, so they have a good assessment of
14 the magnitude of the situation or the lack thereof.

15 But, again, responders were quick, so
16 this talks about if the system is working and being
17 monitored responders get there quickly. And it
18 appears that was the case in this situation.

19 Q. The next factor states, "The physical
20 design of the institution aids in the isolation of
21 problem areas." And you mentioned before in this
22 instance that the -- you know, the location of the
23 fight and the response was in the housing unit.

24 Now, as far as the officers and inmates
25 who were there in the housing unit other than Mr. --

1 excuse me -- Mr. Johnson and Mr. Guy, those -- those
2 people were not physically isolated from the inmates
3 who were fighting, correct?

4 A. I disagree with that characterization of
5 the scene.

6 Q. Why is that?

7 A. I'll admit that they were still out on
8 the floor of the unit, but there was no one in close
9 proximity to that fight. There was only one inmate
10 that I saw. And I believe the rebuttal expert -- or
11 the defense expert mentioned that one inmate showed
12 indications he was going to run towards that fight
13 at one point very early on. That part is reflected
14 in the video, but that person also quickly stopped
15 and dropped to the floor and was in the compliant
16 position.

17 So -- I apologize. That's an alarm
18 sounding there.

19 For effective control that was
20 sufficient.

21 Q. But you would acknowledge there were no
22 walls or cell doors or other physical barriers that
23 would have obstructed movement on the pod floor?

24 A. Yes. Correct.

25 Q. The next factor, "The ability to wait

1 out potential violent confrontations and control the
2 moment of initial contact reduces the need for
3 physical force options."

4 Now, here the altercation had already
5 begun and was in progress at the time the officers
6 were called to respond, correct?

7 A. Correct.

8 Q. Okay. So this would be distinct from
9 something like a cell extraction where the staff may
10 be able to wait out the inmate or choose the time
11 that they intervene?

12 A. That part is correct, but -- and I
13 acknowledge that. And one of the clips that I
14 provided from the Nunez monitor's report related to
15 the timely use of force to keep everyone safe.

16 So I understand that when inmates are
17 fighting you have to intervene, and that's what
18 officers have to do for protection from harm. So
19 I'm not disputing that they needed to intervene to
20 stop a fight. They did. And that's not when the
21 time is to wait, but I do disagree that McCowan
22 needed to take immediate action when he entered the
23 door. That's where I think this point applies.

24 Q. Understood. Not listed there as a
25 separate factor but it's included in that block

1 quote where it states, "Rule violations result in
2 disciplinary action rather than a physical arrest
3 process that oftentimes led to physical
4 confrontations."

5 In this instance the rationale for the
6 initiation of force was -- at least the rationale
7 offered by staff you would agree was the need to
8 control an ongoing altercation; is that correct?

9 A. Are you asking me if I recognize that's
10 what they offered or that I agree --

11 Q. Right. Right.

12 A. I recognize that's what they offered.

13 Q. So do you think this language here has
14 any application involving, you know, a delayed
15 disciplinary charge in lieu of an arrest that could
16 potentially escalate into a physical confrontation?

17 A. I do because -- and I explain that in
18 the rebuttal report because I believe a failure to
19 recognize deescalation of the event based upon the
20 actions of Mr. Johnson and the actions of everyone
21 else in the pod -- and I agree with Mr. Burwell's
22 report where he says Mr. McCowan had his patrol
23 canine that was trained in protection at his side,
24 that was an effective barrier against Mr. Johnson if
25 that was needed.

1 Q. The last factor listed here is "The
2 availability of on-site rapid supervisory response
3 limits the decision-making role of the individual
4 officer."

5 From the evidence you've reviewed did
6 you see whether a supervisor was on site and
7 available in this instance?

8 A. It's my understanding a sergeant
9 responded to that scene fairly quickly.

10 Q. In your experience is the responding
11 officer always required to consult with a supervisor
12 in a time-sensitive response?

13 A. No.

14 Q. Okay. The next section I'd like to talk
15 about here begins on page 8 and is titled
16 Proportionality Is Key. We've referred to this a
17 few minutes ago with the Whitley factors that you
18 list here.

19 From your review of DOC's canine and
20 use-of-force policies do you believe these factors
21 are incorporated into those policies?

22 A. I do not.

23 Q. You do not?

24 A. Correct.

25 Q. Okay. Could you elaborate on that?

1 A. And I may not have understood your
2 question, but are we speaking specifically to the
3 use of canines?

4 Q. Let's start with the use-of-force
5 policy. And I will bring that up, if you'll give me
6 just a second.

7 A. Okay.

8 MR. DAVIS: Madam Court Reporter, let's
9 make this our Number 4.

10 (Defendants' Exhibit 4 was marked for
11 identification.)

12 BY MR. DAVIS:

13 Q. So there's a couple points of the policy
14 I want to highlight and just ask if you believe this
15 is -- if you're in agreement with the
16 proportionality standard and the Whitley factor.

17 First, this highlighted language here,
18 "The use of force is restricted to instances of
19 justifiable self-defense, protection of others,
20 protection of property, prevention of escapes, and
21 to maintain or regain control, and then only as a
22 last resort and in accordance with the appropriate
23 statutory authority."

24 Do you believe that language is
25 consistent with the proportionality standard?

1 A. Except for proportionality I don't
2 believe it is addressed in that statement.

3 Q. I will continue on. Also language here,
4 "Force will not be used for vindictive or
5 retaliatory purposes. The use of force is never
6 justifiable as punishment."

7 Again do you see that as being
8 consistent with the Whitley factors?

9 A. It's not specifically mentioned in
10 Whitley, but that is my understanding. It's part of
11 the constitutional requirements of reasonable force
12 or appropriate force, that it's never used for
13 punishment or vindictive or retaliatory purposes.

14 And that language is common throughout
15 the corrections industry, excuse me, as is that
16 first paragraph that we reviewed, with the exception
17 of the piece that I mentioned. Most agencies have a
18 phrase or clause that speaks to not only as a last
19 resort, excuse me, but the minimum amount necessary
20 to regain control or words to that effect.

21 Q. Okay. So I'm going to move down to
22 another section of the policy here. We're on page 7
23 of the policy now under III. And this states,
24 "Non-force methods of control should be used
25 whenever possible and the minimum necessary force

1 should be used to gain control only when non-force
2 methods have failed or are not appropriate."

3 Sorry. One more I want to highlight
4 here. "Only the amount of force that is reasonably
5 necessary to overcome resistance, mitigate an
6 incident, or gain control under the circumstances,
7 is permissible."

8 Do you feel that this highlighted
9 language incorporates the proportionality standard?

10 A. It does.

11 MR. DAVIS: I'm going to turn to the
12 canine policy now.

13 Okay. Sorry for the delay there.

14 Madam Court Reporter, I would like to
15 make this our Number 5.

16 (Defendants' Exhibit 5 was marked for
17 identification.)

18 BY MR. DAVIS:

19 Q. And, Mr. Hurley, this is the VDOC canine
20 policy, correct?

21 A. Correct.

22 Q. Okay. I'm going to highlight some
23 language here. It says, "While one of the greatest
24 values of canine teams lies in the deterrence effect
25 of their presence, their use is authorized only when

1 the circumstances justify such use.

2 "The Canine Officer should be constantly
3 aware that a Corrections Officer may use only the
4 amount of force necessary to maintain control, and
5 that the use of canine under such circumstances
6 constitutes the use of force or the implied use of
7 force.

8 "In determining the amount/type of force
9 to be used, the Canine Officer should take into
10 consideration all circumstances known to them."

11 Do you feel that this also incorporates
12 the proportionality standard?

13 A. I do not.

14 Q. Could you elaborate?

15 A. There is no guidance here to explain
16 when the use of that high-level type of force would
17 be justified.

18 Q. So your testimony is that you think
19 additional restrictions should be explicit in the
20 policy for it to be proportional?

21 A. Yes.

22 Q. If I could move on now to the next
23 section, the heading is VDOC's Use of Force Policies
24 Are Not In Line With National Correctional Stances
25 Regarding Constitutional K-9 Use. This is page 9 of

1 the report. Do you see that section, sir?

2 A. Yes, I do.

3 Q. So the first subheading under there,
4 Canine Use Of Force In The Confinement Setting Is
5 Rare. You cite to an article by Human Rights Watch
6 for the proposition that the use of canines as an
7 instrument of force in confinement settings is the
8 exception to correctional practice and not the rule.
9 And you further state that "...the few jurisdictions
10 that used canines to maintain order and secure
11 prisoner compliance most typically used them for
12 cell extractions..."

13 I'd like to pull up that article.

14 A. Sure. Excuse me.

15 Q. I'll scroll down to the title here.
16 Mr. Hurley, is this the article cited in your
17 report?

18 A. I believe it is.

19 MR. DAVIS: Madam Court Reporter, I'd
20 like to make this our Number 6.

21 (Defendants' Exhibit 6 was marked for
22 identification.)

23 BY MR. DAVIS:

24 Q. So, Mr. Hurley, do you recall where in
25 this article it discusses how many state

1 correctional systems use canines for purposes other
2 than cell extractions?

3 A. I don't recall that as we sit here.

4 Q. Let me -- I'll start with the summary
5 and if you want to read that. Let me know when you
6 need me to scroll down.

7 A. Okay. Okay.

8 Q. (Scrolling.)

9 A. Sure.

10 Q. All right. I'm going to move down now
11 to page 11 of the article. Let me know when you
12 would like me to continue scrolling here.

13 A. Okay.

14 Q. (Scrolling.)

15 A. Stop. You're going to have to scroll
16 up.

17 Q. Oh. Sorry about that.

18 A. It's been a while since I've had my
19 Evelyn Wood speed reading course.

20 Okay.

21 Q. (Scrolling.)

22 A. Okay.

23 Q. (Scrolling.)

24 A. Okay.

25 Q. (Scrolling.)

1 A. Stop, please. Can you back up just a
2 little, please?

3 Q. Oh. My apologies.

4 A. Okay.

5 Q. (Scrolling.)

6 A. Go ahead.

7 Q. (Scrolling.)

8 A. Stop, please.

9 Okay. Down a little more.

10 Q. (Scrolling.)

11 A. And stop.

12 Okay. Go on down to the next page.

13 Q. (Scrolling.)

14 A. And stop. Okay.

15 Q. (Scrolling.)

16 A. Okay.

17 Q. (Scrolling.)

18 A. Okay. Go ahead. Sorry.

19 Q. Okay. And that's the end of that
20 portion.

21 So is it fair to say that this article
22 focuses on these seven states and their use of dogs
23 for the purpose of cell extractions?

24 A. I didn't take the article that way, that
25 they were only to be focused on cell extractions,

1 although that certainly is the highlight of that,
2 because it speaks to some commissioner saying the
3 dog won't be brought onto the unit at all without
4 the commissioner's approval, reaching out to former
5 directors or high-level corrections officials to get
6 their opinions about the use of canines. So I took
7 the article to represent overall use of canines in a
8 correctional setting and for what purposes.

9 Q. Okay. So then do you take the article
10 to state that only those states listed in the
11 article use canines as a force vehicle?

12 A. No, I didn't take it to read that way.
13 And I can't quote the entire -- I tried to quote
14 parts of it and then break that down into of those
15 that they mentioned using cell extractions how many
16 were left. I think it came down to two, and they
17 rarely used those. But I believe it also spoke to
18 -- I did reread the article this morning -- that
19 maybe 37 states had canine units for use and many of
20 those were used for escape apprehension, drug
21 detection, searches, those kind of things, but
22 again, yes, there was a heavy concentration on cell
23 extraction.

24 Q. And your reference to 37 states that use
25 canines for some purpose, is that anywhere in your

1 report?

2 A. I don't recall. And, again, that's my
3 recollection of that. I'd have to read it again to
4 be absolutely certain.

5 Q. Can you testify at this time to the
6 number of states that use canines for force
7 purposes?

8 MR. JOHNSON: Object to form. You can
9 answer if you know, Mr. Hurley.

10 A. I don't know. And I researched trying
11 to find anything that would indicate that or
12 summarize that, and I was not able to find any
13 research that established that number. So, no, I
14 can't.

15 BY MR. DAVIS:

16 Q. And you also -- I'm turning to page 10
17 of your report. You refer to the fact that
18 Immigration and Customs enforcement doesn't use
19 canines for force, control or intimidation of
20 detainees.

21 In the materials that you reviewed or
22 from your consulting experience do you understand
23 the reason for why they don't use canines for ICE
24 detention?

25 A. The methods they currently have to

1 resolve disturbances are sufficient. No, I don't
2 have direct knowledge of their rationale for that,
3 but it aligns with what I'm aware of as generally
4 accepted correctional practice. And that also
5 aligns I believe with Mr. McCowan's testimony that
6 he was not aware of any other correctional system
7 that used canines for control purposes.

8 Q. And do you know whether Officer McCowan
9 is in a position to know the practices of other
10 state correctional systems?

11 A. I do not know that, but in general
12 specialty units and assets like that tend to be very
13 interested in their specialty. So, for instance,
14 special tactics units, they have a strong interest
15 in that, and my experience is they usually know what
16 their sister states are doing or what other places
17 are doing. It's not out of the realm of
18 possibility. I can't say that he would.

19 Q. Turning back to the question about ICE
20 detention, are the people who are detained by
21 Immigration and Customs Enforcement -- is that
22 population people who are currently serving
23 sentences for criminal convictions?

24 A. Technically, no, but some of them are
25 maximum-security detainees who are back in an ICE

1 detention facility after serving significant time at
2 a state correctional facility for violent crimes.
3 So they're not necessarily all minimum-security
4 detainees.

5 Q. Do you know what share of the detainee
6 population the maximum-security individuals are?

7 A. I do not. I do know that some
8 facilities have a significant portion of their
9 population that falls in that category, but I can't
10 give you that statistic.

11 Q. So I'm going to move on to your next
12 section here titled At A Minimum, The Correctional
13 Industry Recognizes Canine Use Of Force Should Be
14 Limited To Situations Involving Imminent Risk Of
15 Severe Bodily Harm Or Death.

16 A. What page are you on?

17 Q. This is page 10 of your report.

18 A. All right. Okay.

19 Q. You state, "General use of force
20 incidents like inmate-on-inmate fights rarely, if at
21 all, justify the types of injuries caused by
22 canines..."

23 Is there a particular source or basis
24 for that statement, any policy or industry standard
25 that you're referring to?

1 A. Other than force is not to be used to
2 inflict unnecessary pain or proportionality.

3 Q. Do you have any statistics or
4 information regarding the rate of serious injury
5 that can be caused by inmate-on-inmate fights?

6 MR. JOHNSON: Object to the form. You
7 can answer if you know, Mr. Hurley.

8 A. I do not, but I know that's something
9 that is tracked.

10 I'm going to answer that question this
11 way: I'm committed to confidentiality clauses in
12 most of the work I do, so I can say in the
13 monitoring process and in the DHS process some of
14 that involves knowing what the injuries were related
15 to a fight or the use-of-force portion of that,
16 whether the inmate's injuries were caused by the
17 fight or caused by the use of force, or whether
18 those injuries are consistent with the force, if it
19 was necessary, the types of methods that were used.

20 Throughout my career I've used that. I
21 see that used by many agencies. I know there are
22 some elaborate data systems to assess that. I can
23 say that if you did look at our monitor's report for
24 the Nunez consent judgment there would be graphs and
25 statistics in there and pages dedicated to that type

1 of issue, both inmate-on-inmate fights and
2 inmate-on-staff, and use of force, and
3 differentiating the level of injuries and the cause
4 of injury.

5 BY MR. DAVIS:

6 Q. Understood. And just to clarify,
7 certainly I don't want you to feel like I'm asking
8 you to disclose any sort of protected or
9 confidential information during our time today.

10 A. I will say the American Correctional
11 Association in their performance-based standards
12 have assessments they use related to issues like
13 that, and they also look at medical reports to see
14 how many injuries the medical department assesses
15 and the source of those injuries. So it comes
16 through several different channels.

17 Q. Did you consider any of that information
18 in drafting your report?

19 A. Well, globally, just speaking about
20 proportionality, but looking at the Johnson case
21 just on what was available to me and what I
22 received. I just considered the event as it
23 happened to Mr. Johnson.

24 Q. Understood. Further down that page you
25 state, "Canine deployment must be very high on the

1 use of force continuum because of the potential and
2 high likelihood of severe injury to the subject.
3 The precautions used in K-9 and K-9 Handler training
4 confirm these concerns. The training is extensive,
5 lengthy, and strictly controlled."

6 Are you referring in that excerpt there
7 to the DOC canine training or general standards?

8 A. Both, although I'm critical of their
9 training later, but in terms of the length of their
10 training, certainly lengthy, the duration of it,
11 they did have some things where they're referring to
12 strictly controlled. They did have a lot of detail
13 regarding what the decoy should do or what
14 protective gear the decoy should wear and
15 precautions to avoid unnecessary bites and
16 accidental bites. So that portion of their training
17 acknowledges and recognizes the risk of injuries
18 that a canine can produce.

19 Q. Now, referring to the extensive and
20 lengthy nature of canine training, do you just
21 attribute that to the potential injuries and level
22 of force that are involved?

23 A. No, I do not.

24 Q. What else would you consider there?

25 A. I would consider the things in the

1 standards that the defense expert referenced and
2 some of the things that are mentioned in VADOC
3 canine training curriculum. My problem with it, as
4 I said in the rebuttal report, was they really
5 didn't have any details of terms for certain
6 factors, such as what is excessive force, what is
7 proportionality, cognitive bias, and/or normal human
8 reactions to a canine.

9 Q. Thank you.

10 You excerpt from Mr. Burwell's report
11 regarding the nature of injuries that could be
12 potentially caused by a canine. Do you agree with
13 his assessment that dog bites are more severe than
14 injuries from a taser?

15 A. Yes.

16 Q. Could you elaborate on that?

17 A. Part of my responsibilities for the
18 Nunez consent judgment was to review training
19 curriculum such as use of force. The Taser X2 was
20 part of that. And I observed the delivery of that
21 training. So in that training and in the materials
22 the -- there are some concerns about inducing
23 seizures. There is controversy about potential
24 heart capture it's called, capturing the rhythm of
25 the heart, and maybe having serious problems there.

1 So there's precautions about taser placement, but
2 for the most part they really talk about how to
3 remove the probe safely and treat it with an alcohol
4 swab or something and have the medical staff check
5 the person. But in general the likely injury that a
6 person suffers from that is two pin pricks, so to
7 speak, small red spots on their body. So you're not
8 talking about torn skin, broken bones, ripped flesh,
9 or destroyed nerves, those kind of things. So if I
10 -- I would rather be shot with a taser than bitten
11 by a canine.

12 Q. Would you know what the rate of fatality
13 or lethal injury is from a taser versus from a dog
14 bite?

15 MR. JOHNSON: Object to form. You can
16 answer if you know, Mr. Hurley.

17 A. I don't know. I've researched the area
18 related to in-custody death related to restraint
19 methods, but not specific to canine.

20 BY MR. DAVIS:

21 Q. Okay. Let me ask as well about
22 Mr. Burwell's statement that a dog bite can be more
23 serious than a gunshot. Do you agree with that
24 assessment?

25 A. I'm going to defer to his expertise in

1 terms of, you know, seeing more of those things than
2 I would have ever seen. But also I have looked at
3 some research articles related to emergency room
4 physicians or different experts in the canine field
5 of the types of injuries that canines can produce.

6 Q. Okay. But in your experience is a
7 gunshot a more-likely-to-be-lethal use of force than
8 a dog bite?

9 A. I would not necessarily agree with that
10 because people do survive gunshots. It depends on
11 where you shoot the person. And it's in my training
12 related to gangs and things. I've watched a lot of
13 videos where -- either actual footage or
14 reenactments where suspects were shot multiple times
15 and didn't die and still assaulted the police. And
16 then I've seen, as I include in my reports, cases
17 where a canine was engaged in lethal behavior and
18 the handler himself, the police officer, had to
19 shoot the canine to save their life.

20 So -- and the handlers in this case even
21 spoke about, you know, it could be lethal -- like
22 any use of force can be lethal if it's not used
23 properly. And that's why they guide the dog to bite
24 certain parts of the body, to avoid biting a person
25 on the neck or the head or areas that could be

1 fatal.

2 Q. So I'll ask again the same question I
3 asked regarding tasers. Do you know any statistical
4 information about the relative lethality of a
5 gunshot versus that of a dog bite?

6 MR. JOHNSON: Object to form.

7 Mr. Hurley, you can answer if you know.

8 A. Yeah. I do not.

9 BY MR. DAVIS:

10 Q. Okay. So further down, on page 11 of
11 your report, you excerpt from the -- I guess the
12 journal Academic Emergency Medicine an article that
13 they wrote about dog-bite injuries.

14 Did you review Mr. Johnson's medical
15 records in this case?

16 A. I don't recall as we sit here.

17 Q. Do you recall whether any of the
18 injuries he sustained correspond with the injuries
19 listed in this excerpt here?

20 A. I do not recall.

21 Q. Turning to page 12, you cite to an
22 article authored by Peter Meade and the source is
23 Science Direct. In the first bolded language in
24 that excerpt you state, "We also observed that
25 police dog bites tended towards higher numbers of

1 bites in the central areas of the body: the head,
2 the upper arms, and chest."

3 From your review of the evidence was
4 Mr. Johnson bitten in any of these areas?

5 A. He was not, but it did appear to me on
6 the video shortly after Officer McCowan entered the
7 pod the canine leapt high, very high, at
8 Mr. Johnson, and it appeared to me that the canine's
9 head was at Mr. Johnson's head level or right in
10 that area.

11 Q. And did you see from the evidence
12 whether the dog actually connected on a bite when it
13 hit -- it moved in that direction?

14 A. I couldn't see like a bite and hold, but
15 I also could not tell if, you know, the teeth were
16 engaged on Mr. Johnson's body. The video is not
17 clear enough for me to be able to make that
18 determination.

19 Q. Do you know whether Mr. Johnson claimed
20 that the dog had connected?

21 A. I don't recall that, but I do recall
22 something related to an abrasion or a bump on his
23 head or something to that nature.

24 Q. Did he attribute that to the dog?

25 A. I don't recall him attributing that to

1 the dog.

2 Q. I'm turning to page 13 of your report.
3 You quote Officer McCowan as -- or cite to his
4 testimony on the footnote 12 on the accompanying
5 text. You state that, "The VDOC K-9 Handlers'
6 expectations of what the offender had to do to be in
7 compliance - face down with arms out and palms up,
8 or with hands on the back of the head with legs
9 crossed..."

10 I want to pull up Officer McCowan's
11 deposition transcript.

12 A. Okay.

13 Q. Can you see this, Mr. Hurley?

14 A. You may have to enlarge that if you
15 could.

16 Q. How about now?

17 A. One more time.

18 Okay. Thank you.

19 MR. DAVIS: All right. So you cite to
20 page 77. Just if you want to read that I'll scroll
21 down and give you -- and, Madam Court Reporter,
22 let's make this Defendants' Number 7.

23 (Defendants' Exhibit 7 was marked for
24 identification.)

25 THE DEPONENT: Okay. Scroll down just a

1 little bit, please.

2 MR. DAVIS: (Scrolling.)

3 THE DEPONENT: Okay. Stop.

4 BY MR. DAVIS:

5 Q. Are you finished reading that?

6 A. Yes.

7 Q. I'm going to go down to 185 is the other
8 page you cited in support of that statement.

9 A. Yes. If you could scroll back up just a
10 little.

11 Q. (Scrolling.)

12 A. And back up just a little.

13 Q. (Scrolling.)

14 A. Okay.

15 Q. So just in those excerpts there wasn't
16 any testimony there about requiring hands to the
17 back of the head, correct?

18 A. Correct, but if you could pull that back
19 up.

20 Q. Sure.

21 A. Okay.

22 Q. Is there anywhere else you can recall in
23 that testimony that that requirement of compliance
24 was testified to?

25 A. No, I do not. It is possible that I

1 misread that for looking at other depositions -- you
2 know, included that and that did make a reference.

3 Q. Okay.

4 A. I'll also say that usually when people
5 are asking the subject to be with legs crossed
6 that's usually in a kneeling position with their
7 hands still on the back of their head. That's a
8 very common surrender position somebody puts the
9 person in, so...

10 Q. Understood. Immediately after that text
11 you state that Mr. Johnson sustained injuries to
12 several parts of his body. Are you testifying that
13 he was bitten anywhere other than the right wrist or
14 forearm area?

15 A. No, but, again, I don't recall the exact
16 locations of the injuries at this point.

17 Q. Okay.

18 A. Yes. I mean, those two areas.

19 Q. Further down that page you state, "By
20 comparison, to achieve certification for other use
21 of force devices, the officer has to be subjected to
22 the impact of the device."

23 What are you -- are you basing that
24 statement on?

25 A. My training, the training I observed in

1 different facilities, policies that I've seen. So,
2 for instance, I mentioned the OC spray. That's
3 pretty standard, where a person has to be subjected
4 to the agent to become certified in the use of that
5 agent. A taser is one of those other items that the
6 person that's subjected to the effects of the taser
7 becomes certified to carry a taser.

8 Q. Do you know if an officer is expected to
9 be subjected to being hit with impact munitions
10 before he can use those?

11 A. No, not that I'm aware of.

12 Q. Okay.

13 A. But I think I also make that point in my
14 report in that same paragraph. I say, "There is a
15 reason officers are not subjected to the impact of a
16 bullet or some 'less lethal' devices; the risk of
17 death or serious injury is too great."

18 So the beanbag rounds, rubber bullets,
19 those kind of things, would be what I'm talking
20 about there. I wasn't trying to say they have to be
21 subjected to everything.

22 Q. So would you consider an impact round to
23 be comparable at a level of force for a canine?

24 A. Comparable or just below the canine.

25 Q. Were you asking me that or --

1 A. No. I'm saying that.

2 Q. Okay. And officers who are training
3 with a canine, they may wear some protective
4 equipment, but they do assume the possibility that
5 they could be bitten somewhere other than the part
6 of the body that the equipment is covering. Is that
7 fair to say?

8 A. That is fair to say.

9 Q. The last three paragraphs on this page
10 13 -- it begins with a statement, "There is no K-9
11 handler, trainer, corrections officer... that I
12 know, who would ever lie on the ground and subject
13 themselves to the risk of injury these dogs can
14 inflict." And that continues on to the bottom of
15 the page.

16 Is there a source for this excerpt aside
17 from your individual personal experience of being
18 near a canine in a demonstration?

19 A. Other than knowing those handlers. For
20 instance, a highway patroller, or that particular
21 handler. And I meant to say without the protective
22 gear.

23 Q. Okay.

24 A. That's a key phrase I missed. But I
25 don't know anybody that would without any protective

1 gear subject themselves to the risk associated with
2 a canine under a bite-and-hold command.

3 Q. And you had testified before that the
4 patrol canines were not used in your agency during
5 your time in corrections; is that correct?

6 A. That's correct. We --

7 Q. At what -- oh, I'm sorry. Go ahead.

8 A. We did use canines for the search
9 purposes. So we would conduct a facility search we
10 did introduce canines into the search process and/or
11 search of visitor and employee property when they
12 came into the facility and the search of cars in the
13 parking lot for drug interdiction purposes. I have
14 also authorized and used canines for escape,
15 apprehension, or pursuit purposes.

16 Q. And so was it one of those dogs that was
17 the demonstration that you referred to here?

18 A. Correct.

19 Q. I'm turning now to page 14. You cite to
20 the International Association of Chiefs of Police as
21 stating that they stressed that canines should be
22 kept on a lead when tracking suspects to maintain
23 control and reduce bites, and that canines should
24 not be used for routine calls or crowd control.

25 Was the dog in this incident involving

1 Mr. Johnson -- was it ever taken off lead?

2 A. No, not that I'm aware of.

3 Q. Did the source that you cited, the
4 limitation on using canines for routine calls and
5 crowd control, did it specify whether that was in
6 the context of community police or was that extended
7 to a correctional setting?

8 A. Most likely the context of community
9 policing.

10 Q. So after that text there is an excerpt
11 here from one of the monitor's reports from the
12 Nunez case. Do you know what industry or legal
13 standards the monitor was relying on when they
14 reviewed the canine policies?

15 A. Probably those case laws that I
16 referenced earlier in my report, Graham versus
17 Connor or Whitley. And I, again, didn't necessarily
18 share that or cite that with -- with me or the rest
19 of the team.

20 Q. Okay. What was the -- what was the
21 monitor's directive here in reviewing the policies?
22 Was it to implement best practices? Was it just to
23 reach a constitutional minimum?

24 A. None of the things that we do associated
25 with the consent judgment or monitoring is to drive

1 towards best practice. That's outside the scope of
2 what we're charged with doing. And it's my
3 understanding that the court is always striving to
4 have the least amount of -- interference is probably
5 not the right word, but just looking for the most
6 reasonable, least restrictive alternative to
7 practice to achieve constitutional conditions, only
8 that which is absolutely necessary.

9 And I know I'm not saying that in proper
10 legal terms. Those are layman's term. You know,
11 I'd have to look up that language, but that's the
12 intent.

13 Q. Okay. Is the Nunez consent decree --
14 and they've had various changes that were
15 implemented from that. Do you know if that's
16 considered an industry standard by other agencies?

17 A. No, I do not.

18 Q. And I believe you testified to this
19 earlier, but following this report from the monitor
20 was there a final policy that was approved and
21 implemented?

22 A. Yes, I believe so. There was already an
23 existing policy that was being modified to account
24 for concerns and to try to limit the use of canines
25 in conditions where serious bodily injury or death

1 were evident or imminent.

2 Q. Was -- did you review the final
3 modifications?

4 A. Most likely, but we reviewed those
5 policies several times, three or four times, during
6 the revision process. So for me to be able to sit
7 here to say with confidence absolutely I did that, I
8 cannot do that, but --

9 Q. Okay.

10 A. -- most likely.

11 Q. And it cites to -- or it includes the
12 standard in here on SBI, imminent and immediate
13 threat of serious bodily injury or death. Is there
14 a particular threshold or standard that was used
15 here for determining a level of threat that would --
16 that would be at that level, I guess?

17 A. I can't recall a specific standard, but
18 I know that we've had discussions about conditions,
19 and many of those being associated with escape
20 apprehension or a true riot where there's of control
21 of the facility or a unit, where weapons were being
22 used, serious injuries were occurring, and all their
23 methods were not effective or available, and where
24 it was obvious that somebody may die or may be
25 permanently injured, but it was necessary for

1 protection from harm and saving lives to intervene.

2 MR. DAVIS: Okay. Can we go off the
3 record?

4 (Off-the-record discussion)

5 (Recess from 11:54 a.m. to 1:00 p.m.)

6 BY MR. DAVIS:

7 Q. Mr. Hurley, I want to ask you now about
8 subsection C, entitled VDOC's Policies On Use Of
9 Canines As An Instrumentality Of Force Are Outliers
10 On When Canines May Be Used. This is beginning on
11 page 15.

12 A. Okay.

13 Q. In the first sentence of that section
14 you state, "The use of K-9s for routine use of force
15 events in correctional settings is so rare that VDOC
16 is the exception rather than the rule."

17 Could you explain that statement? Have
18 you reviewed policies or practices in other
19 correctional agencies about when canines are used?

20 A. I'm not aware of correctional agencies
21 using canines very often. The ones that I found
22 restrict it to certain types of things, such as
23 escape apprehension, drug interdiction, or imminent
24 danger of death or serious injuries.

25 Q. What states did you look at?

1 A. Well, when I worked with Department of
2 Homeland Security I looked at the use-of-force
3 policies associated with theirs, New York, Ohio
4 certainly. I reviewed Indiana, but not recently.
5 They did use canines at one point. I believe
6 Pennsylvania, but again not in recent history.

7 Q. Any others?

8 A. In some of the cases that I've handled
9 for civil matters, reviewed those use-of-force case
10 -- or policies. But, you know, to specify which
11 states and which policy, you know, I can't sit here
12 and say other than those that I mentioned.

13 Q. Okay.

14 A. But I know I had a use-of-force case in
15 Maine, Louisiana prison parishes, Colorado,
16 Wisconsin, Oklahoma, and then Homeland Security
17 would be California, New Mexico, Arizona, Florida --

18 Q. When you --

19 A. -- Pennsylvania.

20 Q. Excuse me, Mr. Hurley. I'm sorry to
21 interrupt there, but when you were just referring
22 to, I think, the Colorado -- or California, Arizona,
23 a few others, that list there, you said those were
24 Homeland Security policies?

25 A. Those -- yes. Starting with California

1 and the rest that I named, yes.

2 Q. Okay. So those are federal guidelines
3 and those are just the locations that --

4 A. Each facility has their own use-of-force
5 policy.

6 Q. Now, are those ICE facilities?

7 A. Yes.

8 Q. Okay. And the list you gave earlier of
9 Maine, and I think you said Louisiana, Colorado,
10 Wisconsin, and Oklahoma -- did you say those are
11 ones you reviewed for case testimony?

12 A. Yes.

13 Q. Okay. And of those states you listed
14 none of them -- your testimony is none of them
15 permit canines except in specific circumstances?

16 A. That's correct, but, again, it's been
17 years since I reviewed the Indiana policy or
18 Pennsylvania. So best as I can recall.

19 Q. And you continue on to some discussion
20 about VDOC's use-of-force policy and the force
21 continuum. In your experience do other correctional
22 agencies have a hierarchy of force that requires
23 certain levels of force to be exhausted before an
24 officer can move on to the next step up?

25 A. Not completely.

1 Q. Could you explain?

2 A. Most use-of-force policies allow the
3 officers to escalate to higher levels of force
4 options depending on the conditions they're
5 confronted with, but in general the policies speak
6 to start with verbal commands or deescalation
7 attempts, and then usually it's things such as soft
8 -- what they call soft-hand techniques or OC spray.
9 You know, there's not consistency in the industry of
10 which comes first. Sometimes they'll advocate for
11 the use of OC spray versus doing hands-on. I
12 understand that. I don't have a problem with those
13 two things being interchangeable. But then when
14 they get into devices or instruments that may cause
15 serious injury or the potential for serious injury
16 or for death they are higher on the use-of-force
17 continuum and usually there's more specific
18 requirements of conditions that should be met if an
19 officer chooses to use those.

20 So, for instance, a person in custody
21 just refusing to move or verbally swearing at a
22 staff member does not justify the use of a baton, so
23 to speak, to strike the person in custody. If a
24 person is old, sick, and weak, and can be controlled
25 with soft-hand techniques, that has to be taken into

1 consideration. So, therefore, again the use of a
2 taser, a baton, canine, would not be appropriate for
3 somebody who is feeble because they can be
4 controlled through other methods that are more
5 proportionate with the type of threat they might
6 impose.

7 Q. Do these policies spell out the
8 circumstances when a particular -- excuse me -- a
9 particular level of force is allowed?

10 A. Well, without violating my
11 confidentiality cause --

12 Q. Sure.

13 A. -- I'll just speak in general of a major
14 metropolitan use-of-force policy that does give
15 specifics. It differentiates between types of
16 resistance.

17 Passive-resistance things might be
18 somebody just standing there refusing to move or
19 they might be verbally saying -- you know, swearing
20 at the officer or staff or saying "I'm not going to
21 do it" or sitting down refusing to move. Those
22 kinds of things fall under the category of passive
23 resistance. And so then they talk about it would be
24 appropriate for the officer to try to talk to the
25 person or just use their hands to try to lift the

1 person up and guide them where they want them to go.

2 Active resistance then is described as
3 somebody that may try to walk away from the officer
4 or hold onto a door handle or hold onto a pole and
5 do active things to keep themselves from being
6 moved, but is not considered to be a direct threat
7 to the officer for injury or death because the
8 actions are just directed at resisting being
9 restrained or resisting being moved, but not
10 aggressive or assaultive actions.

11 Then the next level would be aggressive
12 resistance where the offender is trying to punch the
13 officer or making moves consistent with those kind
14 of things, combined with other types of threat.
15 They can get into lethal or deadly-force instances
16 where they have a weapon, they are attacking
17 somebody, they're using the weapon, injuries are
18 occurring, those kinds of things.

19 So then they give examples in each of
20 those categories of the types of options in the
21 use-of-force continuum that would be appropriate for
22 responding to that type of resistance. And if it's
23 not in a policy necessarily then where they teach
24 the policy and teach defensive tactics they give
25 examples and go over those kinds of things. And

1 they may have examples of what a reasonable officer
2 would do when confronted with this type of
3 situation.

4 So I've conducted and seen other
5 agencies do that type of thing, where they'll have
6 simulated guns, simulated knives. And really they
7 talk about, well, this is a 70-year-old guy that's
8 five-foot-three and 90 pounds who does have a knife
9 but you're 40 feet away from them, can you use
10 deadly force? And the answer is no, given the
11 parameters of this situation.

12 So they go over those kinds of things
13 and explain why it is or isn't, or they use video
14 from actual events and they present those to the
15 class, and they will stop it perhaps and say, "At
16 this point what's the good decision? What are
17 acceptable decisions?" And there's different ways
18 to put that out.

19 So the concept of the policy is tied to
20 real events with real examples to help reinforce
21 what is considered reasonable force for the types of
22 things the officers encounter on a daily basis.

23 Q. Okay. So you mentioned just now one
24 example of a policy that was a little more
25 structured, about what the parameters would be for

1 different steps of escalation of force, and you also
2 mentioned some training that just sets out scenarios
3 where that might be put into practice.

4 The policy that you referred to, do you
5 know, is that typical for the use-of-force policies
6 that are in other agencies or is there more variety?

7 A. There's variety. A lot of them have
8 that boilerplate language I call it where the phrase
9 of using the minimum amount of force necessary to
10 regain control or protect someone from harm or
11 protect another or stop an escape -- that language
12 is in almost all use-of-force policies. And there's
13 also the phrase that, no, you don't have to go
14 through the entire continuum step by step. It's
15 understood. But it's also understood that if you
16 have a person at the passive-resistance level you're
17 not going to necessarily hit them with a baton or
18 use an instrument of force that's going to cause
19 significant injury based upon their behavior that
20 you're confronted with.

21 Q. And you say that that's understood.
22 Does that mean that it's there in the face of the
23 policy?

24 A. I can't say that -- to that specific
25 example that I gave it's in the face of the

1 policies. No, I cannot say that.

2 Q. Okay. And you on that same page take
3 issue with the -- that the DOC use-of-force policy
4 doesn't speak directly to canine deployment, and you
5 compare it to the provisions in there on chemical
6 agents. So I kind of want to talk about that
7 segment of your report here.

8 Now, first, there is a separate policy
9 that VDOC uses for use of canines, correct?

10 A. There is.

11 Q. And that policy incorporates the general
12 use-of-force principles into it; is that fair to
13 say?

14 A. I have to look back at that canine
15 policy.

16 I'll say yes without reviewing it for
17 the moment --

18 Q. Okay.

19 A. -- the general use-of-force principles.

20 Q. Now, the excerpt that you have from the
21 policy about -- here where it refers to the use of
22 OC spray -- these provisions in here -- just to be
23 clear, it looks like these were amended and added
24 after the incident with Mr. Johnson, correct?

25 A. That may be correct. I think I received

1 different versions of the policy, revised or not.

2 So if this comes from a later version, understood.

3 Q. Sure. So just looking at -- you know,
4 at the direct quote in here, it says there in
5 parentheses changed May 1st, '21.

6 A. Yes.

7 Q. And that is -- I'll just -- I'll
8 withdraw that question.

9 Let me ask you, do you believe that the
10 use of OC spray in this incident was appropriate?

11 A. Yes.

12 Q. Okay. Now, the policy here contemplates
13 at least some circumstances where there would be a
14 need for prior authorization before using OC spray,
15 correct?

16 A. Correct.

17 Q. Was there prior authorization here?

18 A. Not that I'm aware of.

19 Q. So the exception to the need for
20 authorization and this language here on page 15
21 states, "Except when there is immediate danger of
22 physical violence toward other persons by an
23 offender inmate or probationer/parolee..."

24 Would you -- given that you had
25 testified that you believe the use of OC was

1 appropriate in this instance, would you believe at
2 the time it was used there was an immediate danger
3 of physical violence that justified the use of it?

4 A. I do.

5 Q. Okay. Now, the policy language here on
6 chemical agents also includes some provisions about
7 pre-clearing for medical conditions; is that
8 correct?

9 A. That's correct.

10 Q. And it states in there that you check
11 for medical restrictions if time permits, correct?

12 A. Correct.

13 Q. So in an ongoing-fight situation would
14 that be something that would permit time to do such
15 a review?

16 A. The key word there is "ongoing," an
17 active fight. So time did not permit for a medical
18 check, or contraindications as it's referred to,
19 when Mr. Guy attacked Mr. Johnson, while Mr. Johnson
20 was defending himself or engaging in a fight. They
21 didn't have time to call the medical department. I
22 understand that. And those are common practices in
23 the correctional industry, and it's also common
24 practice to add these types of precautions
25 associated with tasers, associated with electronic

1 immobilization devices, or chemical agents. So --

2 Q. And what would be the reason for
3 reviewing for contraindications, for checking for --
4 for a medical condition?

5 A. Because if that use-of-force option
6 creates a serious medical concern, then the security
7 staff have to try to figure out a different option
8 to control the situation or deal with an offender
9 when possible.

10 Q. So, to your knowledge, what sorts of
11 medical conditions might, you know, exacerbate the
12 concern from using chemical agents or from using
13 electronic equipment?

14 A. It could be seizures. It could be
15 asthma. It could be heart conditions. You know,
16 it's never been my job to know and determine all the
17 medical conditions that are contraindications.
18 That's what the medical staff are there for. It's
19 their job just to tell the security staff, "We don't
20 support the use of that option; figure out a
21 different option" or "These are the types of options
22 that don't present a medical contraindication."

23 Q. Now, would there be any sort of similar
24 preexisting medical condition that would exacerbate
25 the effect of a dog bite in a way similar to the

1 ones that you just explained here could exacerbate
2 the effect of chemicals or a taser?

3 A. Again, I'm not a doctor or a nurse, and
4 I would defer to them. As a layman, I would think
5 folks with heart conditions or trauma issues that --
6 or mental health issues, their inability to
7 understand what's going on, could escalate the
8 situation. So given those considerations that a
9 licensed professional might make, I could see where
10 they could say a dog is contraindicated.

11 Q. Okay. Now, on subsection (g), which
12 also includes some language highlighted there, that
13 states, "In a contained area to compel an offender
14 inmate or a probationer/parolee to comply with
15 direct orders when no alternative method of
16 persuasion is effective and other types of force are
17 deemed not appropriate."

18 So that requirement there by the
19 language of this provision applies in the instance
20 of a closed area, correct?

21 A. I'm sorry. I was trying to find that
22 section. What page are you on?

23 Q. Page 16.

24 A. 16. Okay. I was looking for a large G
25 instead of a small G.

1 Okay. What was your question?

2 Q. That subsection there applies in the
3 instance of a contained area; is that correct?

4 A. Yes, for item (g).

5 Q. And would that be distinct from a
6 situation that we saw here, a fight on a pod floor
7 with other inmates and officers in the vicinity?

8 A. I'm sorry. I was reading and not
9 listening.

10 Q. Sure. Would you consider that distinct
11 from the situation that we had here in this case?

12 A. For this particular subsection, yes,
13 it's different.

14 Q. Okay.

15 A. It's distinct.

16 Q. It also refers to -- another section you
17 highlighted talks about "Repeated use of chemical
18 agents within a short period" not being permitted;
19 "A pause between each application is necessary to
20 allow the chemical agents to take effect and to
21 determine if the offender inmate or
22 probationer/parolee is compliant."

23 So, in your experience, does OC spray
24 have a delayed onset of effect?

25 A. It can.

1 Q. Okay.

2 A. Yes.

3 Q. Does a dog bite?

4 A. I think a dog bite has an instantaneous
5 effect.

6 Q. Okay. I'm turning to page 17 now. At
7 the end of the first paragraph you refer to the
8 testimony of VDOC's 30(b)(6) designee testifying
9 that "...nothing in the operating procedures
10 required patrol canine officers to use other forms
11 of less lethal force before utilizing their
12 canines." Do you see that --

13 A. Okay. Yes.

14 Q. -- right there?

15 A. Yes. Yes.

16 Q. Okay.

17 A. Yes.

18 Q. And you testified a moment ago that a
19 use-of-force policy that incorporates a continuum of
20 force -- I believe you stated that most of those
21 policies would permit an officer to escalate to a
22 higher level of force if circumstances required
23 that.

24 A. Yes.

25 MR. DAVIS: Okay. I'm going to share

1 now. This is the 30(b)(6) deposition transcript.
2 Madam Court Reporter, I'd like to make this
3 Defendants' Number 1, 2, 3, 4, 5, 6, 7 -- 8.

4 (Defendants' Exhibit 8 was marked for
5 identification.)

6 BY MR. DAVIS:

7 Q. Can you read this okay, Mr. Hurley?

8 A. You might want to enlarge it just a
9 little bit for me, please.

10 Okay. Thank you.

11 Q. Okay (scrolling).

12 A. You might have to scroll back up. I'm
13 sorry.

14 Q. (Scrolling.)

15 A. That's okay.

16 Q. And so the designee does testify here
17 that the operating procedure does not expressly
18 state that canine officers are required to use other
19 forms of less lethal force before using the canine.
20 However, do you see immediately before that he
21 states, "...if you become a canine officer, you get
22 trained on how to use your dog, which would be the
23 last resort"?

24 A. I'm sorry. If you could point that out
25 for me.

1 Q. (Indicating.)

2 A. Okay. Okay.

3 Q. So then would you consider that training
4 then as instructing the canine handlers that -- that
5 the dog is higher up in the continuum?

6 A. I might if the training materials or
7 curriculum had any details or points where they
8 could demonstrate they taught the things that he
9 just mentioned, or if their canine handlers in their
10 deposition testimony could articulate that, or there
11 was documentation of any scenarios they conducted to
12 demonstrate that, but I didn't find any of those
13 details or evidence to corroborate or validate his
14 statement in this deposition.

15 Q. I'm looking now at your statement here
16 at the end of the next paragraph where you stated,
17 "In no arena is a person in retreat considered to be
18 posing an immediate threat and yet the VDOC Use of
19 Force Policy allowed for this action because it was
20 silent regarding any precautions, restrictions or
21 controls for this very high level use of force."

22 So from your review of the evidence, did
23 Officer McCowan indicate either in his reports or in
24 his testimony that he, in fact, perceived
25 Mr. Johnson to be retreating?

1 A. No. I did not see that he indicated
2 that he perceived retreat.

3 Q. So would a -- how would a more
4 structured continuum of force or the other policy
5 restrictions you talk about here -- how would that
6 have caused Officer McCowan to have perceived what
7 Mr. Johnson was doing any differently?

8 MR. JOHNSON: Object to form. You can
9 answer if you have any idea, Mr. Hurley.

10 A. I will answer the best I can with the
11 way I think I understand the question, or I'll refer
12 to my experience or training or training I've
13 witnessed.

14 And I think this comes out of the
15 rebuttal report. I didn't see any evidence of
16 teaching the canine handlers or officers to
17 understand human behavior that could be interpreted
18 in various ways so that when you see things you have
19 a broader range of interpretation. Some it could be
20 a threat and some it's a sign of deescalation or
21 natural reaction to things, natural reaction to a
22 predator. And that's why I focused on the flight,
23 fight or freeze response, which is the normal
24 behavior not consistent with the training. It's
25 just any normal human being is going to do certain

1 things when they face a significant threat.

2 So when you have that type of threat
3 attached to your side through a leash and you're
4 responsible for using that force it's incumbent upon
5 the agency to talk about natural responses of humans
6 beings and their behaviors which may not constitute
7 a threat, and to take into consideration when
8 they're observing the behavior, where they enter
9 into a situation. And there is no evidence that
10 that was taught. And the national standards that
11 the defense expert referenced brought out that
12 cognitive bias was a key component of canine
13 training, and I didn't find any evidence of that.
14 And that goes directly to this incident, in my
15 opinion.

16 BY MR. DAVIS:

17 Q. Okay. I think we'll be getting to that
18 section of your report relatively soon.

19 There are a couple other statements here
20 I wanted to ask you about in the next section here,
21 being VI, VDOC's Canine Policies Fail To Take Into
22 Consideration Other Challenges To Controlling
23 Actions And Reactions In Canine Deployments, here on
24 page 17.

25 A. Okay.

1 Q. In the first subsection here you discuss
2 K-9 unpredictability, and that includes an excerpt
3 here in reference to the Nunez case.

4 Was there a point that you found in your
5 review of the evidence that the canine acted in this
6 instance unpredictably or was outside of Officer
7 McCowan's control?

8 A. I did not.

9 Q. Okay. And you include an excerpt from
10 DOC's training curriculum on the following page,
11 here on page 18. Would you acknowledge that DOC
12 training recognizes the issue of canine
13 unpredictability?

14 A. Yes. That's my actual statement.

15 Q. On page 20 you discuss how Officer
16 McCowan had been bitten by the first canine that was
17 assigned to him. He testified that after he had
18 been bitten by his first dog he was no longer
19 assigned to that dog, correct?

20 A. Correct.

21 Q. Okay. And so then he began training on
22 the next dog, which was the one that was involved in
23 this incident with Mr. Johnson, correct?

24 A. Correct.

25 Q. Did you see any evidence that that dog,

1 shadow, ever bit Officer McCowan or somebody else
2 who he had not been directed to bite?

3 A. I did not.

4 Q. All right. You state that, "K-9
5 unpredictability and uncontrollability should be
6 incorporated into the VDOC Use of Force policy."

7 In what way would that be incorporated?

8 A. Well, I think to emphasize the risk
9 associated with canines in a facility, that other
10 staff could be bitten, offenders could be bitten
11 unintentionally, and, therefore, extreme caution
12 must be exercised where you take these canines and
13 how you use them and into what situations you go.

14 Q. From your review of the evidence are
15 VDOC canine handlers and the dogs themselves trained
16 in obedience to reduce the likelihood of an
17 accidental bite?

18 A. It was in the training curriculum.

19 Again, there was a lot of detail about that. There
20 is detail about training the dog, what actions they
21 would take to teach the canine proper behavior,
22 whether it was sit and hold, how to respond to
23 someone who had surrendered, those kinds of things.
24 There wasn't a lot -- there was some discussion
25 about teaching handlers or a discussion of how much

1 correction to give at times, harsh correction, harsh
2 voice, tug on the lead, those kinds of things. So,
3 yes, there was some documentation of obedience
4 training.

5 Q. And then you also note in here that --
6 you say the canine training prohibits the repeated
7 applications of force.

8 And then you include an excerpt from the
9 training manual, and that states not to continue
10 with the application of force and -- if it's working
11 and not use the dog multiple times when the
12 pain-compliance force has not worked to that point.

13 Are you offering the opinion that
14 Officer McCowan did not comply with his training?

15 A. Based upon comments from Mr. Burwell and
16 my training, the exposure to different types of
17 things such as painful-bites techniques, where --
18 yes, we were trained that, okay, if you continue to
19 apply a pain-compliance technique beyond a certain
20 point you're actually escalating the use-of-force
21 event and you could cause the offender to become
22 aggressive when they, in fact, were not, they're
23 just responding to the pain.

24 So given that the continuation -- this
25 was at least the second or third bite upon

1 Mr. Johnson, as I understand it. He had several
2 injuries to the forearm and the wrist and he was on
3 the ground. He was in a compliant position. So the
4 need to continue that -- first, the bite wasn't
5 necessary. Second, the need to continue was not
6 necessary. And it lasted much longer than, you
7 know, a short application of pain compliance.

8 Q. So I want to unpack a little bit what
9 you just said.

10 You stated that you understood this to
11 be the second or third bite on Mr. Johnson. What
12 evidence are you relying on to inform your opinion
13 that he was bitten multiple times?

14 A. One, the medical report. I did look at
15 that over the lunch break. I looked at the photos
16 of the injuries. And I reviewed the video again.
17 And it looks like when K-9 Shadow approaches
18 Mr. Johnson in the area where they're going to go to
19 the ground, Mr. Johnson testified that he gave the
20 dog his arm because he didn't want to get bitten in
21 the face. And it looks like the dog does grab Mr.
22 Johnson by the forearm. And that appears to be
23 consistent with McCowan's testimony and the defense
24 expert's review of the video that the dog has
25 Mr. Johnson by the arm and they go to the ground.

1 It looks like the dog switches position, you know,
2 it's not totally clear from the video, but maybe
3 closer to the wrist or hands than the forearm area.
4 So it appears from the photos that he's got bite
5 marks in several areas on his arm. And then the
6 duration.

7 Q. I'd like to -- give me just a second
8 here.

9 A. While you're doing that can I give you a
10 specific page that I looked at from the medical
11 documentation?

12 Q. Sure.

13 A. That would be Johnson 582000102. So
14 that's at 582000102.

15 MR. DAVIS: And I'll have to -- I don't
16 have that document prepared at the moment, so we may
17 want to go back to that at a later time today.

18 I do have the photos here and I'd like
19 to take a look at those.

20 THE DEPONENT: Sure.

21 (Defendants' Exhibit 9 was marked for
22 identification.)

23 BY MR. DAVIS:

24 Q. Now, Mr. Hurley, are you offering an
25 opinion from your review of the photos or the

1 medical records based on any kind of expertise in
2 identifying bite marks?

3 A. No, I'm not offering that, but the
4 medical notes indicate that they're from a dog bite
5 or dog encounter. As a matter of fact, Johnson in
6 582000100 -- 582000100, at the top of that note
7 says, "Refer to dog bite QUD chart."

8 So this appears to me that this is in
9 his medical file associated with what I believe to
10 be the emergency room. This is for May 2nd, 2020.

11 I'm sorry. Bear with me.

12 Q. That's okay. I need to get this pulled
13 up myself. I will take this off the screen share.

14 A. Sure.

15 Yeah. That was from Norton Community
16 Hospital. N-O-R-T-O-N Community Hospital.

17 Q. Okay. And so while I am pulling up the
18 medical record here I would like to go back to the
19 photos.

21 MR. DAVIS: Madam Court Reporter, can we
22 make this our Number 10?

23 (Defendants' Exhibit 10 was marked for
24 identification.)

1 BY MR. DAVIS:

2 Q. Is there anything that you identify in
3 this photo as indicating that there were multiple
4 bites?

5 A. Not from the photo, but, again, from the
6 photos associated with the medical records. So --
7 and I'm sorry -- Johnson 58200003. And I believe
8 this is probably the facility nurse note prior to
9 sending him to the community hospital. "Offender
10 brought to medical due to altercation. Lacerations
11 x 3 to right lower arm/wrist..."

12 I can't quite make that out.

13 "Multiple puncture sites to right lower
14 arm/wrist. Laceration to left side forehead at
15 hairline. OC utilized.

16 "All lacerations and punctures cleaned.
17 Offender will be sent to Emergency Room for repair
18 of lacerations. Dressings applied to wounds to
19 control bleeding. Reddened area across low back."

20 So based upon the facility
21 documentation, based upon the emergency room
22 documentation, combined with the photos, I'm using
23 their medical assessments to say there were multiple
24 locations.

25 Q. Okay. Is this the document you're

1 referring to here?

2 A. It appears to be, yes.

3 Q. Okay. And I still need to -- let me
4 stop the screen share a moment.

5 I can't seem to combine these, so we'll
6 just take a look at the other Bates page that you
7 referred to. This is Bates page 100 from the
8 medical records from the hospital chart that you
9 were discussing earlier.

10 A. Yes.

11 Q. Okay. And what's the portion of this
12 that you referred to for...

13 A. I'm going to look at my document. I
14 made several references, so it's probably not that
15 particular Bates number. Let me get that for you.
16 That will be the Bates number ending in 102.

17 Q. Okay. That's just a few pages down. Is
18 it this?

19 A. Yes.

20 Q. Okay. So from the documents that you
21 reviewed and the video can you tell whether Officer
22 McCowan gave an additional command for the dog to
23 bite as opposed to the dog adjusting its grip?

24 A. I cannot.

25 Q. Okay. And Officer McCowan had testified

1 that he released the dog from Johnson to avoid
2 further harm to him even though he stated that
3 Johnson had not complied with his order to remove
4 his left hand, correct?

5 A. That's what he testified to, yes.

6 Q. Okay. I'm moving on now to subsection
7 B, which is called Natural Responses and Failures To
8 Recognize It. So regarding the citation here, the
9 first excerpt in footnote 34, this is -- it appears
10 to be an article from a website Medical News Today.
11 Along with it it has the URL for a video. Do you
12 see that?

13 A. Yes.

14 Q. Do you know if that article is from a
15 peer-reviewed journal?

16 A. I do not.

17 Q. Do you know if this is an accepted view
18 in the community of people with the relevant
19 specialty here, I would guess psychologists or
20 psychiatrists?

21 MR. JOHNSON: Object to form. Mr.
22 Hurley, you can answer if you know.

23 A. I don't know the answer to that
24 question.

25 What I do know is my next reference is

1 to a clip from Psychology Today, which has been in
2 existence from my understanding for a long time, and
3 it's consistent with the material contained in the
4 VADOC basic correctional officer training. They do
5 have a fairly extensive section detailed about
6 fight-or-flight responses. I think I referenced
7 that, but perhaps not, in this report. Maybe that
8 was in the Garrett report.

9 But contained within the basic officer
10 training curriculum VADOC has a fairly extensive
11 section on fight-or-flight responses, which aligns
12 with these two citations that I made. I'm not sure
13 that I could pull that up at the moment, but I know
14 that I saw that.

15 BY MR. DAVIS:

16 Q. So you understand that to be a part of
17 the basic officer training?

18 A. Yes. Correct.

19 Q. Okay. Now, are you offering any
20 testimony here regarding the fight-or-flight-or-
21 freeze response based on your own experience in
22 psychology or a related field?

23 A. No. And I don't hold myself out to be a
24 psychologist --

25 Q. Okay.

1 A. -- but I can rely upon my training or
2 research and, in fact, I incorporated the flight or
3 fight -- flight-or-fight response or freeze response
4 in the training that I developed for the Ohio
5 Department of Youth Services related to being in
6 compliance with a consent judgment in use-of-force
7 matters. And I referenced other sources to get the
8 foundation for some of that.

9 Q. There is another excerpt then that
10 begins on page 23 and continues into page 24. This
11 is from Dr. Homer Venters, the report states,
12 "Former Medical Director for the New York City
13 Department of Corrections."

14 Would you tell me what the relevance of
15 that excerpt is to this case?

16 A. He talks about dual loyalty, and he
17 explains that -- how medical staff can fail to
18 follow their charge, I guess, or see offenders as
19 their patients and respond to their reactions and
20 behaviors as patients and/or witness use-of-force
21 events which have fatal results where those staff
22 fail to recognize that a person is in medical duress
23 because they'd become tainted, that's my word, or
24 jaded, for lack of a better word. So they fail to
25 recognize natural human responses.

1 So this is another way of supporting my
2 contention that you have to be able to recognize
3 normal reactions to certain things because it can
4 result in a use-of-force death when you fail to
5 recognize those things.

6 I think that's also true in the
7 corrections industry in general. Many times inmates
8 no longer have a luxury of being viewed as having
9 normal human reactions. There is a tendency to
10 interpret everything they do as resistance, threat,
11 or aggression. So those reactions that any of us
12 would have are not recognized or only interpreted in
13 one way, which then can result in serious injury,
14 excessive force, or in-custody death. It can happen
15 to the medical staff and it can happen to the
16 corrections staff.

17 And I believe it happened in this case
18 because there was no training to recognize the
19 natural reaction to a predatory canine ready to bite
20 or given the command to bite.

21 Q. And after that excerpt you discuss the
22 need for officers to be trained on fight, flight or
23 freeze. How is a correctional officer supposed to
24 distinguish a fight-flight-or-freeze reaction from
25 something that is genuinely threatening?

1 A. Part of that comes through training
2 and --

3 Q. What -- I'm sorry. Go ahead, sir.

4 A. So I already mentioned that you may use
5 existing material, events, incidents, videos where
6 somebody can assess what happened and say, "Okay.
7 Here's a reaction. Here's what this inmate is
8 doing. So let's go over this or let's run you
9 through some scenarios to test that."

10 Because if you never discuss it, if you
11 never provide any examples, once again you don't
12 deal with cognitive bias. And the only way to deal
13 with cognitive bias is to include it in your
14 training. That's why that national standard talked
15 about cognitive bias. But I didn't find any
16 evidence that the VADOC canine training curriculum
17 did deal with cognitive bias or documented that they
18 ever had.

19 Q. Now, at least on part of this reaction
20 that you discussed here, flight, fight or freeze,
21 the first of those reactions being fight, correct?

22 A. (No response.)

23 Q. I mean irrespective of the inmate's
24 intentions, whether it's a natural reaction or
25 whether it's something premeditated, if an inmate

1 has a fight response to something isn't that still a
2 security concern that would require a response?

3 A. It can, but it doesn't mean that it
4 requires a significant-injury type of response. So
5 let me explain it this way: Lots of times people
6 think of fight and flight as a great big response.
7 So I'm going to punch you and knock you out type of
8 fight response. Well, there's very subtle types of
9 things that represent fight response. For instance,
10 if a fly lands on my forehead or a mosquito bites
11 me, as most people do I'd probably slap that
12 mosquito or brush that fly off. That's a very minor
13 form of a fight response. It doesn't fall into this
14 triggering all these emotions and everything, but
15 it's just a normal reaction.

16 He just came out of a fight. He -- as I
17 explained in my rebuttal report, he doesn't know
18 necessarily who all is still around him or is a
19 potential adversary. So when he comes up, as
20 Officer Mullins pulled him up, it's a neural
21 response for him possibly to still be in
22 self-defense mode. It doesn't mean that he intends
23 to attack the officer, it doesn't mean that he's
24 going to hurt anybody else, but he's still in that
25 fight-or-flight response.

1 Recognizing that, as I said in my
2 rebuttal report, many officers would announce
3 themselves and break that concentration and that
4 response to let him know I'm the staff, I'm not an
5 adversary, I'm not a threat, to help break -- break
6 that fight-or-flight response that he's in. The
7 other piece of that is, I'm sorry, if I came up off
8 the ground and turned and saw a canine who was ready
9 to lunge at me, that also might be a natural
10 response for self-preservation and protection.

11 So you can have those reactions, but it
12 doesn't mean that you're a threat to the officer.

13 Q. And aside from the positioning of his
14 hand and his fist you also talk about Johnson making
15 an effort to get the dog to stop biting, how that
16 would have been a natural response, and how Officer
17 McCowan should have recognized that response.

18 What behaviors did you observe Johnson
19 engaging in while he was being bitten that's
20 consistent with him attempting to get the dog to
21 stop biting?

22 A. It appeared to me that when he was on
23 the ground face down with Shadow engaged on his hand
24 or forearm or something, that the free hand may have
25 been up either pushing on the dog's face or trying

1 to protect his hand or protect his head or some such
2 motion. The video is from a distance that I cannot
3 be certain exactly what Mr. Johnson was doing. It
4 did not appear to be aggressive or, quote, fighting
5 the dog. It appeared to be a behavior that would be
6 consistent with fight or flight, trying to remove
7 the dog.

8 Q. So your testimony is the reaction is
9 what he's doing with the free hand?

10 A. From what I can see. And that would be
11 consistent with Mr. Burwell's report talking about
12 the natural reaction of people to struggle against
13 the bite or try to get away from the bite.

14 Q. I'd like to move on now to here on page
15 25, the next section, which is Failure Concerning
16 Warnings.

17 You discuss the bark-and-hold practice
18 included in an excerpt there. To your knowledge, is
19 the bark-and-hold practice applicable in a
20 correctional setting?

21 A. Not necessarily as defined by searching
22 a building, and that's what my understanding is from
23 these articles, they were talking about when they
24 reference bark and hold. But the concept still
25 applies, and Mr. Burwell referred to that, that

1 Mr. McCowan could have just had his canine bark
2 while Mr. McCowan had the canine in a hold type of
3 command. So Johnson is standing in front of him,
4 the canine is still barking but realizes it's not
5 been given the command to bite, so creating a
6 barrier between McCowan and Johnson as a way to
7 contain the situation, evaluate, and start dialogue.

8 Q. Do you know if that's something that
9 would be incorporated into bark-and-hold training is
10 to use the dog in that manner during a fight
11 situation as compared to a search context?

12 A. I do not, but from the canine handlers
13 I've had experience with it's my understanding they
14 all have that ability, to use their canines to hold
15 a suspect at bay or subject in a position in front
16 of them where they can contain the situation.

17 Q. And the canine handlers you're referring
18 to, are those police dogs or are those in
19 corrections?

20 A. They were associated with the highway
21 patrol, the Ohio State Highway Patrol. One of those
22 handlers that I referenced in my report was a
23 corrections officer, but he also served as a county
24 sheriff's deputy. So his canine was his county
25 sheriff's deputy's canine, but he also brought it in

1 for corrections work.

2 Q. Okay. Would that dog not have been
3 trained for patrol use similar to the VDOC dogs
4 we've been talking about here or would that dog have
5 been trained in more of a search-and-apprehension
6 method like a police dog?

7 A. He did use the dog in the county jail
8 where he worked. I don't know the extent of all
9 that, but he also used it for search and
10 apprehension.

11 Q. Do you know whether bark-and-hold dogs
12 bite more or less often than bite-and-hold dogs?

13 A. From what I found from research it was
14 about the same, as I recall.

15 Q. And what was your source for that
16 information?

17 A. Probably one of those that are listed in
18 my footnotes, but I'd have to go back and look. I
19 didn't put that in the report, I don't believe.

20 Q. Okay.

21 A. And that's as I can recall.

22 Q. Now, here on page 26 you include an
23 excerpt from the training curriculum. And the VDOC
24 training, according to this excerpt, requires the
25 canine handlers to give warnings; is that correct?

1 A. That's correct.

2 Q. When you say whether it was realistic
3 for Mr. Johnson to hear, understand, and
4 instantaneously respond to warnings given by Officer
5 McCowan, can you state or affirm from your
6 experience or from the sources that you have
7 researched if there is a sort of a standard reaction
8 time?

9 A. I can't cite a source that gives a
10 standard reaction time.

11 Q. Okay.

12 A. But I think that the training and
13 testimony goes to giving them a reasonable chance to
14 respond to the command. And I know Mr. Burwell
15 spoke to that too.

16 I would hope that if I were coming up
17 out of a situation where I had to defend myself, and
18 Mr. Johnson did because Guy had the upper hand and
19 was really pounding on him for the first part of
20 that fight, that I would need a little time, more
21 than a second or two, to get my faculties, take in
22 what was around me, understand what I was being
23 asked to do, and the chance to comply to it.

24 And Officer McCowan had dispatched K-9
25 Shadow on Mr. Johnson in approximately two seconds.

1 And you may be able to give multiple commands in two
2 seconds, but there's no time in between each of
3 those commands to expect a person to -- a normal
4 human being to have a reasonable time to respond to
5 that. Plus, I'm sorry, if you have an
6 attack-trained canine at your side, telling me to
7 get on the ground and expose my body with my face
8 down to a canine that's very likely going to bite me
9 and hurt me, I'm going to hesitate to do that. I
10 really am. And I think that's natural.

11 Q. I'm moving on to the next section,
12 Failure Concerning Excessive Force. We're still
13 here on page 26.

14 A. Okay.

15 Q. You state that, "According to the VDOC's
16 Statewide Canine Coordinator" and it appears your --
17 actually, there is not a footnote there.

18 A. Correct.

19 Q. You state, "...the K-9 Handlers were not
20 trained regarding excessive force issues, except
21 that perhaps using a K-9 in a cell extraction event
22 might lead to excessive force."

23 Do you happen to recall where in his
24 deposition transcript this might be?

25 A. I would have to go back and look. And I

1 apologize. There were two different coordinators
2 from my understanding. And I'll say their names
3 incorrectly, but I believe the first one was -- is
4 it Bernocco, something like that?

5 Q. Yes. And so that's the -- that was the
6 30(b)(6) designee.

7 A. Then the second one was a sergeant. And
8 I apologize for not having that reference there. I
9 would have to find it.

10 Q. Let me pull up Major Bernocco's
11 transcript here.

12 A. Okay. I'll try to find it myself.

13 Q. And I'll zoom in a little bit for you.
14 Is this what you're referring to here?

15 A. If you could just scroll up a little bit
16 and let me see what was asked before that or where
17 they're at. I'm just seeing an answer.

18 Q. So I'm referring to your portion of the
19 report in here that states that the Statewide Canine
20 Coordinator testified that K-9 handlers were not
21 trained regarding excessive-force issues.

22 A. Okay.

23 Q. And I did want to focus on this
24 testimony here where it appears that Major Bernocco,
25 the current statewide canine coordinator, states

1 here -- and I believe this might be the section
2 you're referring to.

3 A. Okay. It could be. At least it matches
4 with that topic.

5 Q. Now, it appears that in the same answer
6 he states that they train to use appropriate force
7 needed at the time of the incident or situation at
8 hand and we always train to use the least amount of
9 force.

10 Is that -- would that be consistent with
11 training on the issue of excessive force?

12 A. Not necessarily. And if you pull the
13 page back up, he goes on to say that, "We don't
14 train on excessive force." Can we go back to that
15 page?

16 So here are my concerns: You need to
17 have some training so staff can recognize and can
18 understand what types of things constitute
19 unnecessary excessive force. And when I looked at
20 the VADOC use-of-force policy or training materials,
21 in their definitions of excessive force they use the
22 term "excessive force". Well, it's hard to define a
23 term when you use the term to make the definition.
24 Excessive force is when you use excessive force.
25 Well, that's not guidance. How does a person know

1 what constitutes excessive force if the definition
2 uses the same term? There's no clarification there.

3 Q. Understood.

4 Your following testimony on page 27
5 about scenario-based training and the requirement
6 for detailed scenario guides -- are there any
7 industry standards that you're referring to for
8 that?

9 A. No. I can't speak to industry
10 standards.

11 When I worked for the Ohio Department of
12 Corrections those were some of the requirements that
13 our training academy required us to live by, so to
14 speak. Also when I worked for the Department of
15 Youth Services as a consultant again the training
16 department required that level of detail to approve
17 the lesson plan. And then just from experience from
18 running scenarios that if you don't have guidance
19 from the instructors scenarios can get out of hand
20 and people can get hurt, the instructors, the
21 students, those kind of things.

22 And so you have to have good controls on
23 the speed at which you're going to go and when
24 you're going to go that speed what the role player
25 may do so it matches with the skills that have been

1 taught up to that point, and safe words so you can
2 stop a scenario if it gets into the realm of where
3 somebody has been hurt, and that everybody
4 understands those safe words, and basically why
5 you're conducting the scenario, what you expect to
6 get out of that, what the objectives are, what you
7 expect the students to take away, how you're going
8 to recap those points, the important ones that match
9 the training material at that stage of the lesson
10 plan. So without those things it's just all over
11 the map and you have no quality control and you
12 can't verify what was done.

13 And, in fact, one of the sergeants,
14 which I think was a statewide canine coordinator --
15 he was asked, "Do you know if the person you
16 supervised was taught some of these things?"

17 He said, "Unless I taught them, I don't
18 know."

19 So he verified the concern that I have,
20 when you don't have those types of details even the
21 instructors don't know what other instructors
22 taught.

23 Q. On that same page you discuss Officer
24 McCowan's testimony that they're trained to stop
25 using force when the threat has ceased, and you

1 state that that is not the correct standard for
2 excessive force.

3 What in your experience is the correct
4 standard for excessive force?

5 A. What page are we on?

6 Q. I think that is on 27.

7 A. Okay. Sorry.

8 Okay. I see that. And I may not have
9 included a reference to their -- the handlers'
10 collective understanding of what constitutes threat.

11 They were equating failure to fully
12 comply, from their testimony, as the threat
13 remaining. And there were variations of what full
14 compliance meant. Some of the testimony indicated
15 that if they weren't in full compliance they could
16 still be considered a threat.

17 So my concern was with their
18 understanding and definition of threat as being not
19 in full compliance, so, therefore, you have the
20 passive or no resistance but in noncompliance as
21 being considered a threat. So my concerns were with
22 their definitions and classification of threat.

23 Q. You next include an excerpt from
24 Mr. Burwell on page 27 and going into 28. Are you
25 adopting that as part of your opinion?

1 A. Yes.

2 Q. Do you have experience with the
3 prey-drive behavior in dogs?

4 A. I do not.

5 Q. Okay. Do you have experience with the
6 reaction -- seen the reactions of a person being bit
7 by a dog?

8 A. No, not directly, but from research and
9 watching the videos, and I can rely upon other
10 experts, which I've done in this case --

11 Q. Uh-huh.

12 A. -- and trust his expertise and his
13 experience, which is extensive.

14 Q. Turning now to page 28. This is section
15 VII here. It's False Narratives And False
16 Justifications.

17 This includes an excerpt from one of the
18 -- it appears to be one of the monitor's reports
19 from the Nunez case. And you put some language in
20 there that talks about ostensibly lawful
21 applications of physical force to mask the
22 intentional infliction of punishment, retaliation or
23 reprisal on prisoners.

24 Have you seen any evidence here that
25 Officer McCowan intended to punish or retaliate

1 against Mr. Johnson?

2 A. No, but with the knowledge of infliction
3 of pain and injury -- you know, it's
4 disproportionate to the objective risk. And that's
5 the rest of the quote -- or parts of the quote from
6 Mr. Martin.

7 Q. Did you include this to speak to any
8 belief that this, in fact, was the situation here,
9 that Officer McCowan was using pretextual force as
10 an intention to punish Mr. Johnson or to retaliate
11 against him in some way?

12 A. Not under that definition, no, but I am
13 saying it was not proportionate to the actions that
14 Mr. Johnson presented to Mr. McCowan.

15 Q. So that if you were to draw any
16 conclusions based on this language from Nunez,
17 you're saying the basis for that would be just the
18 nature of the force incident itself?

19 A. Well, I'll deal a little bit with the
20 pretextual part. It appears the practice in VADOC
21 and the canine handlers -- and as I spoke to a
22 moment ago, their definition of threat is anything
23 but 100 percent in compliance of some nature, be
24 that down on the ground, hands out, palms up, or
25 some variation of that. That appears to be their

1 testimony. That appears to be what they did in this
2 case.

3 So that sets the stage for a very quick
4 use-of-force authorization. And some of them also
5 testified to they thought about what they would have
6 to answer to versus doing nothing or doing
7 something. And in their apparent definition doing
8 something means use force. Now, does it mean stop
9 and hold? Does it mean engage in verbal
10 deescalation? Does it mean you step back when you
11 can, give space? So I think from what I've seen it
12 appears that pretextually they are predisposed for a
13 very quick decision to use a high level of force.

14 MR. DAVIS: Madam Court Reporter, I
15 noticed it seemed like you may not have gotten all
16 of that.

17 BY MR. DAVIS:

18 Q. And, Mr. Hurley, I apologize. It
19 sounded like you broke up a little bit there. Did
20 that --

21 A. Okay. I can repeat if you need me to.
22 My internet gave me an unstable notice a second ago.
23 So did I cut out?

24 Q. It's still a little bit shaky right now.

25 A. Do you want me to try to call in and

1 pick up the audio that way?

2 Q. Do we want to take maybe five minutes
3 and see if when we come back if we've got a little
4 bit of a better connection, and if that doesn't work
5 we can try calling in?

6 Yeah. That's fine.

7 MR. JOHNSON: Is that okay with you,
8 Pat?

9 THE DEPONENT: That's fine.

10 (Recess from 2:29 p.m. to 2:38 p.m.)

11 BY MR. DAVIS:

12 Q. Okay. I'm turning now to page 25.
13 After the excerpt you included there you state that,
14 "There is evidence that a false or exaggerated
15 narrative was used in this case. Among other
16 things, the K-9 handler (Officer McCowan) claimed
17 that Mr. Johnson made an aggressive or threatening
18 move towards the officer (Officer Mullin) who had
19 used chemical agents."

20 Did the evidence you reviewed indicate
21 that this was a false statement by Officer McCowan
22 rather than his -- being his genuine perception?

23 A. I'm sorry. What page are you on?

24 Q. 29.

25 A. Okay. I thought I heard 25.

1 Okay. And your question is?

2 Q. From the evidence you reviewed did that
3 show you that the statement made by Officer McCowan
4 was false instead of being his genuine perception of
5 what was occurring?

6 A. It doesn't match the video evidence and
7 it doesn't match the video evidence that was
8 presented to him during his deposition when he had
9 opportunities to recognize or acknowledge that
10 Mr. Johnson was stepping back. I think it goes to
11 the -- partially to the pretextual concerns that I
12 discussed just prior to the break and some of the
13 interpretations of lack of full compliance
14 represents threat.

15 So if you're not looking for other
16 things, and if you interpret every behavior as a
17 threat, that leads to exaggerated claims where your
18 world only perceives actions in one way.

19 Q. Did you review reports of any other bite
20 incident by Officer McCowan that you believe to be
21 false?

22 A. I don't believe I did. I guess what I'm
23 trying to say here is that I believe the canine
24 handlers are predisposed to interpret many behaviors
25 as a threat.

1 Q. I understand.

2 A. But --

3 Q. I'm sorry to cut you off, sir. I'll let
4 you go ahead.

5 A. -- which in the experiences that I've
6 had, experience directly with officers myself, in
7 use-of-force events I've monitored, I'm not seeing
8 officers react the same way to the same situation
9 under the same circumstances. Their perceptions
10 would be different because they have been trained in
11 the use other techniques so it would not necessarily
12 have drawn the same conclusions. They would have
13 seen it for what it was.

14 Q. So I'll ask the same question regarding
15 reports of other bite incidents.

16 Well, let me ask you, did you review any
17 reports of any other bite incidents other than this
18 one? I won't ask you to disclose information you
19 obtained solely through the Garrett matter since I
20 understand you have a protective order in that.

21 A. Okay. And again they both -- I've
22 looked at information in both cases, but for me to
23 sit here and say specific to Officer McCowan I can't
24 say that in particular. I believe I have, but, you
25 know, there's a blending for me in terms of an

1 overlap of materials. Does that make sense? That's
2 in one part probably where the basic correctional
3 officer training issue came into play.

4 Q. Yeah. And so -- well, then let me ask,
5 are there any reports from any other bite incidents
6 or any materials regarding other bite incidents by
7 DOC handlers that you have listed in the materials
8 that you reviewed for your report?

9 A. If they were received as part of
10 Garrett, yes. Would that make sense? I don't know
11 how to answer that question correctly, I guess. But
12 they -- those issues weren't relied upon for this
13 case.

14 Q. Okay.

15 A. But let me put it this way: I just
16 tried to focus on this particular incident --

17 Q. Uh-huh.

18 A. -- and the factors of this incident.

19 Q. Okay. So you aren't offering any
20 opinion about any other incidents here?

21 A. No.

22 Q. Okay.

23 A. Other than what I picked up from their
24 deposition testimony or the statewide coordinator
25 testimony or training curriculum information or the

1 lack thereof.

2 And I did want to add to one of my
3 previous answers, if that's okay.

4 Q. Sure.

5 A. You asked me a question related to is
6 there a national standard requiring scenario guides
7 or instructions and those kinds of things, or a
8 question to that effect, so --

9 Q. Uh-huh.

10 A. And I talked about my experience with
11 the Ohio Department of Youth Services, part of the
12 consent judgment, one of the monitoring team members
13 was responsible for training, a person by the name
14 of David Roush, and he did review all the training.
15 I saw him at some of those training sessions. So he
16 was one of the driving forces for the style of the
17 lesson plans, the details of the lesson plans and
18 requirements for the lesson plans. So it was an
19 additional, I guess, requirement to comply with his
20 request to meet the training standards.

21 Q. And which case did you say that was in?

22 A. That was SH versus Stickrath.

23 Q. And that -- I think you testified that
24 did not include any canine issues, correct?

25 A. Correct.

1 Q. Okay.

2 A. But just going to my expectations for
3 scenario guides and the details of the scenario
4 guides, that's where my reference would come from.

5 Q. I'm going to move on now to the next
6 section of your report. This is Section VIII,
7 Event, beginning on page 29.

8 A. Okay.

9 Q. You discuss the possibility of using a
10 fight break-up technique while the fight was ongoing
11 with Mr. Johnson and Mr. Guy. In your experience is
12 it normally the expectation for a correctional
13 officer to physically place themselves into an
14 inmate fight to attempt to break it up?

15 A. No. And that's not what my report is
16 implying. In fact, we train against getting between
17 two fighters. That's stupid. It'll get you -- so
18 the technique that I'm referencing is applied from
19 behind the inmate, and it usually takes two people
20 to apply it to both inmates.

21 So the training does teach to separate.
22 And it is effective. I've used it. I've watched
23 other staff use it. So it's one option that was
24 available here. And the reason I say that is
25 because when Officer Mullins did pull Mr. Johnson to

1 separate him from the fight Mr. Johnson separated.

2 Q. On page 33 you discuss that it appeared
3 that Mr. Johnson was trying to step around Officer
4 Mullins and that he appeared to be trying to
5 deescalate himself.

6 Did you gather from anything in his
7 testimony that this was what he was intending to do
8 here?

9 A. Not on this point directly, but he did
10 testify that he had not been and would not be
11 aggressive towards the officers, that he had no
12 intention of hurting an officer.

13 Looking at the video, at his behavior
14 associated with that, that matches his testimony in
15 this case, because at that point with Officer
16 Mullins he's in direct contact with Mr. Johnson. So
17 if there's ever an opportunity for Mr. Johnson to
18 assault an officer, to do so that it would be
19 perceived as a threat, this is the moment. They are
20 face to face, body to body, and Mr. Johnson steps
21 away.

22 Q. And I'm going to jump ahead to your
23 analysis here --

24 A. Sure.

25 Q. -- that begins on page 47.

1 A. Okay.

2 Q. On 47 and going into 48 you refer to the
3 30(b)(6) designee's testimony that scenario-based
4 training wasn't required; it would have varied
5 depending on who ran the session.

6 Do you recall from your review of the
7 evidence whether Officer McCowan himself testified
8 about whether he went through scenario training?

9 A. The dog handlers or canine handlers did
10 testify that they had gone through scenario
11 training. They made reference to that, but most of
12 those were fairly generic without any detailed
13 description of what actually was conducted during
14 that training, and there was no documentation to
15 validate (video transmission interruption)...

16 THE REPORTER: Mr. Hurley, we lost you.

17 THE DEPONENT: I may have to call in.

18 MR. JOHNSON: Let's go off the record.

19 (Recess from 2:53 p.m. to 2:57 p.m.)

20 (The answer was read by the reporter.)

21 BY MR. DAVIS:

22 Q. Mr. Hurley, on pages 49 to 50 you
23 discuss that the testimony of the two canine
24 officers along with Major Barbetto was inconsistent
25 about what they understood compliance to be:

1 Officer McCowan stated that compliance meant hands
2 out, legs crossed, complying with orders; Major
3 Barbetto said that compliance meant hands out, palms
4 up and not moving; and Officer Baker said that --
5 that attempting to fight off a bite was not in
6 compliance.

7 How were those answers inconsistent with
8 one another?

9 A. I'm sorry. You're on page 49?

10 Q. Going into page 50 and ending at
11 footnote 65.

12 A. I'm going to -- and I'll answer that
13 question, but I think I need to get an adaptor for
14 my phone so I can put in a headset so I can hear the
15 questions.

16 Q. Okay.

17 A. I'll answer if you want before we take a
18 break, but -- I'm not trying to avoid the question,
19 but --

20 MR. DAVIS: No. Why don't we go back
21 off for five minutes?

22 MR. JOHNSON: Yeah. That's what I was
23 going to suggest. Why don't we take a five-minute
24 break and we'll re-ask the question to him and pick
25 up from your pending question.

2

3 MR. DAVIS: Madam Court Reporter, could
4 you please read back to Mr. Hurley the last question
5 I asked before we went off the record?

6

(The question was read by the reporter.)

7

(Off-the-record discussion)

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Q. That's the gist of it, yes, sir.

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You know, legs crossed, both hands out? I don't recall seeing inmates on the ground in this video with legs crossed. So I'm not sure when and exactly how. Is that a kneeling position with your legs crossed as I described earlier or face down legs crossed? Is that only in one person's definition? You know, when is the

1 surrender-compliant position is what I'm trying to
2 get at. And if there's differences among the
3 handlers, then how are inmates supposed to know
4 exactly what the correct position is?

5 And I understand there is inmate
6 handbook direction about get on the ground, do those
7 kind of things, but it just seems to me that each
8 handler had a different understanding of exactly
9 what he was supposed to do to be considered no
10 longer a threat.

11 Q. Understood.

12 I'm turning now to page 52, and you
13 reference Mr. Barbetto's testimony. This is at the
14 end of the first paragraph. And you state that, "He
15 did not suspect the presence of a weapon and" --
16 this is referring back to his own prior use-of-force
17 incidents when he was a canine handler.

18 "He did not suspect the presence of a
19 weapon and did not base his use of force decision
20 solely upon a suspicion of a weapon and they were
21 trained to consider the totality of circumstances
22 when making use of force decisions."

23 Is your testimony here then that canine
24 use is only justified in the presence of a weapon?

25 A. No, that's not my testimony, but I would

1 expect that before you would use this level of
2 use-of-force options. What I was trying to use, to
3 tell it a little better, his testimony for was to
4 demonstrate that the lack of ability to see an
5 inmate's hands was not necessarily sufficient for
6 his deployment of the canine. In part that was
7 Mr. McCowan's continued justification, the continued
8 bite-and-hold technique used by his canine, because
9 he was not able to see Mr. Johnson's hand.

10 Q. And so are you saying that's not
11 sufficient according to the standard that
12 Mr. Barbetto had articulated there, or is that, you
13 know, in accordance with your opinion and your
14 understanding of use-of-force principles?

15 A. I'm going to just speak to the
16 conditions of this situation because it gets
17 convoluted if we try to talk about all kinds of
18 different scenarios. But given what Mr. McCowan was
19 faced with when he entered the unit, and the
20 considerations that I've discussed in my report, and
21 options that he had, and one of those was to use the
22 canine as a barrier and start that dialogue to gain
23 compliance, and/or you have an offender who is
24 actually engaging in compliant behavior, he gave his
25 arm to the canine and went to the ground. You know,

1 those indicators are of compliance, not of threat,
2 not of continued threat.

3 Q. I'm continuing on that page. You
4 discuss Officer McCowan's testimony, and then at the
5 end of the third paragraph you state, "To use
6 Officer McCowan's logic, if a police officer arrived
7 on the scene of a fight and had not seen a weapon,
8 did not have any reason to believe one of the two
9 people in the fight had a weapon, the police officer
10 could and should shoot one of the fighters 'just to
11 be sure.'"

12 We talked about this somewhat earlier,
13 but in this instance here with this statement are
14 you saying that the shooting is comparable to the
15 use of the canine?

16 A. It's a high level of force. I'm
17 applying Officer McCowan's logic as an analogy to a
18 rule-enforcement situation. He also testified that
19 he didn't have reason to suspect that Mr. Johnson
20 had a weapon, and he also testified that all other
21 force options had been used, so the only thing left
22 was the use of the canine.

23 Well, that's not standard practice and
24 that's not what officers are supposed to do when
25 they arrive on the scene. They're supposed to

1 assess the situation and establish their control of
2 the situation, and that includes using verbal
3 engagement, taking the time if you've got time to
4 establish safety for yourself -- he had that with
5 that canine -- and use that advantage to talk the
6 person through compliance. But in McCowan's world,
7 according to his testimony, when he arrived on the
8 scene all those other things were out the window and
9 he was already a long way down the use-of-force
10 continuum to a very short decision-making matrix to
11 process that "I'm going to deploy the canine" almost
12 instantaneous.

13 Q. I'm going back to that statement and the
14 comparison you make there. In your experience, and
15 all other things being equal, would you expect a
16 greater likelihood of a weapon being present in a
17 prison fight compared to a street fight?

18 A. Not necessarily. And I don't know how
19 many weapons are found in street fights. Certainly
20 I've seen and responded to and reviewed thousands of
21 cases involving inmate-on-inmate fights, some with a
22 weapon and some without. So, yes, for officer
23 safety you always have to be concerned that there
24 may be a weapon or there could be a weapon, but it
25 doesn't mean that you go to a high level of force

1 immediately upon -- I mean when you've just
2 encountered, when you arrive into the unit, without
3 knowing any of the other factors or without taking a
4 moment to assess those factors when you have the
5 chance to do so.

6 You know, officers around the country
7 every day have to deal with these situations without
8 the luxury of a canine to protect them. And in many
9 situations they're able to gain compliance, still be
10 safe, without necessarily using force in a situation
11 like this one and address their concerns safely.

12 Q. Okay. I'd like to move on now to the
13 list of opinions here beginning on page 53.

14 A. Okay.

15 Q. As we discussed at the beginning of the
16 deposition, just for my understanding of what is
17 being offered as an opinion here and what's being
18 offered in support of those opinions, I wanted to
19 walk through with you to see if you believe that,
20 you know, any particular parts of your opinion, you
21 know, support any particular ones of these sort of
22 bottom-line opinions at the end of the report.

23 So starting with opinion number 1, "The
24 use of a K-9 in this case was not warranted or
25 supported by accepted correctional practices, nor

1 was it consistent with law enforcement practices for
2 K-9 deployments. Mr. Johnson was not resisting or
3 demonstrating any threat when a K-9 was commanded to
4 bite him and cause serious permanent injuries."

5 Is there any particular sections of your
6 report that you consider to be in support of this
7 opinion?

8 A. Yes.

9 Q. Okay. What are those?

10 A. I'll have to get the pages out, but the
11 sections where I reference the Human Rights Watch
12 research regarding the use of canines in the
13 correctional industry; the Department of Homeland
14 Security policy regarding prohibiting the use of
15 canines in a use-of-force event or the presence of a
16 canine with the presence of detainees; monitoring --
17 or the monitor's report related to the restrictions
18 for the use of canines in the corrections
19 environment; references to Mr. Burwell's report, and
20 some citations he made in his experience as a law
21 enforcement officer and a law enforcement officer
22 who has used canines, trained canine teams and
23 evaluated canine teams. So I think those would be
24 some of the -- and my review of thousands of
25 use-of-force cases -- would be the support where

1 it's not consistent with accepted correctional
2 practice or normal practice.

3 Mr. Johnson was not resisting or
4 demonstrating any threat. When he had the
5 opportunity to assault an officer and they were
6 physically in contact he did not do that. He, in
7 fact, stepped away from that officer and as
8 documented in the video and through deposition
9 testimony he took five steps back at least. And
10 Officer McCowan acknowledged that. And I believe
11 that was either for the second deployment or at the
12 first deployment. And I gave supporting references
13 to fight-or-flight responses that would explain
14 Mr. Johnson's behavior. And no one documented that
15 he made any verbal threats towards any staff. I
16 never saw a statement that he said "I'm going to
17 hurt you, stab you, slap you, kick you, punch you,
18 kill you" or do any such thing.

19 So that wouldn't support a claim that
20 Mr. Johnson had intentions to assault. He didn't
21 step towards staff in an aggressive manner. He
22 stepped back.

23 Q. Okay. Same question for opinion number
24 2.

25 A. I think I just described some of that.

1 Q. Okay.

2 A. Yeah. Well, one thing I didn't speak
3 to, in reviewing the video, particularly as
4 Mr. Johnson is going to the ground and as he's going
5 he uses his left hand to brace himself as he goes to
6 the ground, an open palm, like that (indicating), as
7 he's going down. And, as I said, he had that hand
8 out in front of him at some point while the canine
9 was still engaged where his hand was visible or
10 accessible to Officer McCowan. So his hand wasn't
11 hidden under his body the entire time. In fact, it
12 was out where it could be seen in some manner in
13 front of McCowan for a significant portion of that
14 prolonged bite and particularly going down to the
15 ground.

16 So, to my opinion, the video evidence
17 does not support every contention that Officer
18 McCowan is making.

19 Q. Just to follow up on that last bit
20 there, did you see in the video his hand go under
21 his body?

22 A. For a brief moment. I would have to
23 watch that video again. I don't know if we want to
24 do that.

25 Q. I'm just asking from your recollection.

1 A. I believe it did, but for not very long.
2 And that can be part of the response of protecting
3 your fall to the ground or going to the ground. Is
4 it normal for any of us to tuck our arms under the
5 body when someone is trying to restrain them? Yes,
6 that can happen and does happen, but it didn't stay
7 there it did not appear to me for very long, that
8 his other hand it appears came out, but again from a
9 distance it's hard to tell.

10 Q. Okay. Opinion number 3 I did not see
11 discussed in the body of the report, unless I'm
12 mistaken. Was there anywhere prior to this opinion
13 where you talked about the bite ratio?

14 Mr. Hurley, you're on mute.

15 A. Sorry. I must have touched the mouse.

16 I do recall discussing that prior to
17 that statement. It could be a crossover between the
18 other case and this one --

19 Q. Okay.

20 A. -- but it goes to the difficulty to make
21 a valid assessment given the frequency of loss of
22 records.

23 Q. And that loss of records you're
24 referring to is from the DINGO system, correct?

25 A. Correct.

1 Q. Did you review any documents that
2 pertained to calculating the bite ratio based on
3 incident reports that were filed in the CORIS
4 system?

5 A. I don't believe I did. If that's a new
6 system, I didn't receive, that I'm aware of,
7 anything associated with that. The only thing I
8 would have reviewed, and I'll probably say it wrong,
9 is their monthly canine patrol reports.

10 Q. Uh-huh.

11 A. And that references if they're just
12 routine patrol or if they're responding to an
13 incident. And then I would have to look at the
14 actual incident itself to get the description and
15 find out what they encountered and whether they
16 engaged or did not engage.

17 Q. Can you speak to from your experience if
18 a bite ratio was known what an acceptable ratio of
19 bites versus canine responses would be?

20 A. The only thing that I saw that was
21 related to that was in some of the research
22 articles, that anything above 30 percent, but those
23 were applied to law enforcement in the community,
24 not in a corrections environment. So, to my
25 knowledge, there is no minimum acceptable bite ratio

1 for the corrections environment. It's all
2 street-cop use in the community where the ratio is
3 considered. But I think it's important for an
4 agency to know how often canines are used in a
5 use-of-force event and sort of to have what they
6 deem to be appropriate, necessary or correct.

7 And I think the point of this is with a
8 system that loses data or makes it really difficult
9 to make an accurate assessment, the oversight
10 portion of that suffers. You can't have a robust
11 oversight system if your data keeps missing or if
12 you're not doing an analysis on your own.

13 Q. Understood.

14 Moving on to opinion number 4, do you
15 have any corresponding analysis anywhere else in
16 your report regarding this opinion?

17 A. You mean other than his testimony?

18 Q. No. I mean any discussion or sources
19 cited in your report about what you state here in
20 opinion number 4.

21 A. Well, I'm not sure -- rephrase that
22 question because I'm not sure exactly what you're
23 asking me to answer.

24 Q. So does -- is there any discussion, you
25 know, in the main body of the report, what we've

1 been talking about for most of the day, related to
2 this ultimate opinion that you offer here, number 4
3 on page 53, regarding Mr. Barbetto?

4 A. I don't know if there was a dedicated
5 section of the report to this specific point,
6 perhaps the collection of different sections of the
7 report where there was testimony about these types
8 of issues, but again I was going to the oversight
9 concern or even within the training curriculum they
10 talk about proper supervision of the canine program.
11 Well, these things in this item number 4 would fall
12 into that category.

13 Q. So from your review of the evidence did
14 that show you whether Mr. Barbetto reviewed the
15 video and bite reports after each use-of-force
16 event?

17 A. From his testimony I didn't see
18 documentation of that; in other words, any form with
19 his signature that he had reviewed it, at least as I
20 recall. And he indicated that he did look at those,
21 as it says here, but the investigators never
22 contacted him or got his opinion or sought him out
23 to say "Was this the proper use of a canine, was
24 this okay, or is it something they should have done
25 differently?" None of that.

1 And even though he said in his prior
2 experience, as I understand it, he had conducted
3 use-of-force investigations, he just hasn't
4 conducted canine use-of-force investigations. And
5 if I'm mischaracterizing that, I apologize, but
6 that's what I recall.

7 Q. Well, Mr. Barbetto was experienced prior
8 to being the statewide coordinator as a canine
9 handler, correct?

10 A. I believe so, yes.

11 Q. Would it be -- would it be fair to state
12 from that that he would have familiarity with policy
13 and training requirements and the practices
14 involving use of force?

15 MR. JOHNSON: Object to form.

16 Mr. Hurley, you can answer if you know.

17 A. He should have. My concern here is it
18 doesn't appear that he was applying it in any manner
19 which would constitute effective oversight. He was
20 basically looking at it but not making any
21 conclusions and leaving it up to the investigators
22 or the investigations division to make all the
23 determinations. And they weren't consulting him and
24 he wasn't engaging them, so I'm not sure what the
25 purpose was for him to review the cases if he didn't

1 really do anything with it.

2 BY MR. DAVIS:

3 Q. And I'll move on to opinion number 5.

4 Is there any portion of your report that corresponds
5 to this opinion?

6 A. I can't recall that specific other than
7 McCowan's deposition, which is referenced in this
8 footnote 93.

9 Q. So is your opinion here that it was
10 improper to have patrol canines trained for that
11 purpose and not for -- well, let's start with
12 contraband detection.

13 What would be the reason why that would
14 be improper?

15 A. I'm not saying training a canine for
16 contraband detection would be improper. It is
17 proper, and I have used canines for contraband
18 detection.

19 I guess the point I was trying to make
20 here is, I didn't see training of those canines that
21 are being used in the facilities for any other
22 purpose other than patrol. Now, VADOC may have
23 other canines that are used for these other
24 purposes, but they're not the canines that are
25 walking inside the prison is my understanding. They

1 have other canine resources to do those other
2 things, but it appears to be the sole purpose for
3 the canines in the prison -- it is for a show of
4 force and/or a use of force and not for anything
5 else.

6 Q. If there were other canines that were
7 used for -- let's pick the contraband example right
8 now. And so if there were canines trained for the
9 purpose of use of force in patrol and canines -- a
10 different group and different handlers trained for
11 contraband detection, would that be a problem, in
12 your view?

13 A. Not based on the way you phrased the
14 question, no, but my concern is -- let's take that
15 large case that I've referenced in the Nunez report
16 in district court. It's my understanding those
17 canines are capable of doing various things and
18 they're not solely at the jail for the purpose of
19 use of force only. They do have detection
20 capabilities and primarily are used for that. And
21 they're not routinely used for a fight break-up or
22 this type of event.

23 So it seems to me the VADOC focused on
24 use of force with the canines, that that's their
25 mission and that's their purpose and that's how we

1 use them.

2 Q. From your experience do you know whether
3 different breeds of dog would be more or less
4 effective in those different roles?

5 A. I do not. Again, the research talks
6 about different breeds have stronger predatory
7 instincts or responses and some may not have that as
8 strongly as others. So it would depend on the
9 purpose of what you use them for, but I'm not the
10 expert. That's why we have Mr. Burwell.

11 Q. Okay. On opinion number 6 is there any
12 specific portion of your report that you would offer
13 in support of that?

14 A. Well, I think throughout my report, you
15 know, I talked about how officers routinely respond
16 to fight break-ups and different options that they
17 have to use. So saying it was reasonable for an
18 officer to choose to use a canine to respond to this
19 incident with Mr. Johnson's behavior does not match
20 with what other corrections officers are doing
21 across the country.

22 No weapons were found and McCowan
23 testified that he didn't have any reason to believe
24 that Mr. Johnson had a weapon.

25 I cannot find that any reasonable time

1 was allowed for Mr. Johnson to comply with orders to
2 get on the ground if, in fact, he was given the
3 number of orders that Officer McCowan claims that
4 were given. He might be able to state those orders
5 within two seconds, but give the person the time to
6 actually respond to it. And that's the reason I
7 also included the parts about the OC spray in using
8 an application and giving the person the time to
9 experience the effects. Same concept, just applied
10 differently. So he didn't have time to respond and
11 comply.

12 Then there are assessment criteria.
13 I've talked about that. It doesn't have
14 fight-or-flight or normal human reactions to a
15 threat. And so, therefore, if they don't train
16 that, they don't understand that, they're not going
17 to recognize it. And it didn't because he was
18 reacting in a way consistent with fight or flight.
19 So I think that addresses number 6.

20 MR. DAVIS: Ms. Adams, did you get all
21 of that last part?

22 THE REPORTER: I think I did. I think
23 his picture froze, but I don't think his voice
24 froze.

25 (Answer read by the reporter.)

1 THE REPORTER: Did I get it all?

2 THE DEPONENT: Yes. From my end, yes.

3 BY MR. DAVIS:

4 Q. Okay. On opinion number 7 is there a
5 particular part of your report corresponding with
6 that?

7 A. Yes. In my report I talked about their
8 policies, the use-of-force continuum, where it fell
9 in there or not. I cited some testimony from the
10 canine statewide coordinator or other canine
11 handlers. And I think we even went through some of
12 that testimony while we were speaking.

13 So, yes, based on those things from the
14 testimony, from the requirements of compliance,
15 which I mentioned, I think that supports number 7.

16 Q. Same question for number 8.

17 A. Okay. I included snapshots of video
18 evidence in my report, and within those snapshots I
19 also provided text boxes to demonstrate what I was
20 seeing. So I think it's factual, as far as I see
21 it, that Mr. Johnson stepped away from Officer
22 Mullins, did not do anything aggressive to Officer
23 Mullins, nor did he do anything aggressive towards
24 any other staff. And, in fact, the video shows he
25 did not step toward any staff member after he was

1 separated from the fight. And Officer McCowan
2 acknowledged that during deposition testimony when
3 he was given the chance to watch the video there.

4 He was not running around frantically
5 trying to find a person to assault. I don't think
6 there's anything in that video that suggests or
7 coincides with running around frantically. It
8 appears that he turned his attention to the canine,
9 which was flying at him at his level, and that
10 appears to be where his attention was focused when
11 the canine arrived. And, again, the commands to get
12 on the ground were given really before he had a
13 chance to comply. He didn't have a chance to do all
14 of that before that canine was on him.

15 And then I cited a portion of
16 Mr. Burwell's report.

17 Q. Number 9. Are you offering the same
18 materials in support of that?

19 A. Yes. Part of it was Mr. Burwell's
20 report, part of it's my experience, part of it's
21 from watching thousands of use-of-force cases, my
22 own officers that I supervised doing the things that
23 I'm talking about.

24 Q. Now, I did want to ask about one
25 component of this opinion. You discussed that

1 Officer McCowan was in no significant danger, K-9
2 Shadow was trained in handler protection and would
3 have been a barrier to keep Mr. Johnson away if
4 Mr. Johnson had approached aggressively.

5 Did Officer McCowan suggest that -- or
6 attempt to justify that the initial bite of
7 Mr. Johnson on the ground -- that it was necessary
8 for him to defend himself?

9 A. I don't recall him making that claim
10 because he was referencing alleged aggressive
11 movement toward Officer Mullins.

12 Q. I'll need just one second here,
13 Mr. Hurley.

14 All right. Just a quick question about
15 your rebuttal report. On page 14 into page 15 you
16 discuss the involvement of Dave Robinson, the Chief
17 of Corrections Operations, one of the defendants in
18 this case. Is there a particular part of
19 Mr. Kmiecik's report that you are including this
20 discussion to rebut?

21 A. He determined that they had adequate
22 oversight, adequate supervision. So this goes to
23 the lack of -- lack of responsiveness, lack of
24 awareness, regarding issues with canine policy or
25 canine training issues. So I think his lack of that

1 level of awareness does not establish robust
2 oversight.

3 Q. And so you were just offering that in
4 response to the general conclusion of -- regarding
5 supervision?

6 A. Yes. Where the defense expert
7 referenced that they had adequate supervision as a
8 group. There was accurate supervision -- and I'm
9 paraphrasing. And that's also referenced in the
10 training curriculum as one of the things that's
11 required for a good -- a valid canine program is to
12 have adequate supervision or oversight.

13 MR. DAVIS: Okay. I have nothing
14 further.

15 MR. JOHNSON: All right. I don't have
16 any follow-up questions for Mr. Hurley at this time.

17 MR. DAVIS: Okay. Thank you,
18 Mr. Hurley.

19 We can go off the record.

20 (Signature not waived.)

21 (The deposition concluded at 3:51 p.m.)

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23

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25

DEPOSITION ERRATA SHEET

Case Caption: Corey E. Johnson v. (K-9) Officer
McCowan, et al.

Deponent: Patrick H. Hurley

Deposition Date: September 13, 2022

I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me. I request that the following changes be entered upon the record for the reasons indicated. I have signed my name to the Errata Sheet and the appropriate Certificate and request both to be attached to the original transcript.

Page/Line Nos. Correction/Reason

Signature: _____ **Date:** _____
PATRICK H. HIRLEY

PATRICK H. HURLEY

1 **CERTIFICATE OF DEPONENT**

2 **COMMONWEALTH OF VIRGINIA**
3 **CITY OF _____**

4 Before me, this day, personally appeared PATRICK
5 H. HURLEY, who, being duly sworn, states that the
6 foregoing transcript of this deposition, taken in
the matter, on the date and at the place set out on
the title page hereof, constitutes a true and
complete transcript of said deposition.

7
8
9 -----
 PATRICK H. HURLEY

10
11 SUBSCRIBED and SWORN to before me this _____
12 day of _____, 2022, in the jurisdiction
aforesaid.

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16 My Commission Expires

 Notary Public

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1 **COMMONWEALTH OF VIRGINIA AT LARGE, to wit:**

2 I, William J. Hudson, Electronic Notary
3 Public for the Commonwealth of Virginia at large, of
4 qualification in the Circuit Court of the City of
5 Richmond, Virginia, and whose commission expires May
6 31, 2023, do hereby certify that the within named
7 deponent, PATRICK H. HURLEY, appeared before me, as
8 hereinbefore set forth, and was duly sworn by me.

9 I further certify that I am not related
10 to nor otherwise associated with any counsel or
11 party to this proceeding, nor otherwise interested
12 in the event thereof.

13 Given under my hand and notarial seal
14 this 16th day of September 2022.

15
16
17 _____
18 Electronic Notary Public
19 Notary Registration No. 7253936
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23
24
25

1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, Kathleen Beard Adams, CCR, RPR, CRR,
3 do hereby certify that the within named deponent,
4 PATRICK H. HURLEY, appeared before me, as
hereinbefore set forth, and after being first duly
sworn, was thereupon examined upon his oath by
counsel for the respective parties; that his
examination was recorded in Stenotype by me and
reduced to computer printout under my direction; and
that the foregoing constitutes, to the best of my
ability, a true, accurate, and complete transcript
of such examination.

8 I further certify that I am not related
to nor otherwise associated with any counsel or
9 party to this proceeding, nor otherwise interested
in the event thereof.

10 Given under my hand this 16th day of
11 September 2022.

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17 *Kathleen Beard Adams*
18 Certified Court Reporter
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